

V. 2940

No. 14788

**United States,
Court of Appeals
for the Ninth Circuit**

DOROTHY S. WALKER,

Appellant,

vs.

WEST COAST FAST FREIGHT, INC., a Corpo-
ration, and M. L. BURR,

Appellees.

Transcript of Record

**Appeal from the United States District Court
for the District of Oregon**

FILED

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DOROTHY S. WALKER,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Oregon

Civil No. 7092

DOROTHY S. WALKER,

Plaintiff,

vs.

WEST COAST FAST FREIGHT, INC., a Corporation, and M. L. BURR,

Defendants.

PRETRIAL ORDER

The above-entitled cause came on regularly for pretrial conference before the undersigned judge of the above-entitled Court on the 14th day of February, 1955. Plaintiff appeared in person and by Nels Peterson of her attorneys. Defendants appeared by John Gordon Gearin of their attorneys. The parties with the approval of the Court agreed to the following

Statement of Facts

I.

At all times mentioned herein, plaintiff was a resident and citizen of the State of Oregon; that the defendant West Coast Fast Freight, Inc., was a corporation organized and existing under and by virtue of the laws of the State of California, with an office and principal place of business in Portland, Multnomah County, Oregon; that the defendant M. L. Burr at the time of the service of process

was and is a resident, inhabitant and citizen of the State of Washington; that a diversity of citizenship exists between the plaintiff and both of the defendants and that the amount in controversy is in excess of \$3,000.00.

II.

At all times herein concerned, defendant West Coast Fast Freight, Inc., owned and operated a trucking service engaged in transporting cargoes and property within the State of Oregon and that the defendant M. L. Burr on May 3, 1953, was an employee of the defendant West Coast Fast Freight, Inc., in the capacity of a truck driver.

III.

On or about the 3rd day of May, 1953, an automobile operated by plaintiff was proceeding northerly on Highway 99E and at a point near Albany, Oregon, left the highway, as a result of which plaintiff received some injury.

Plaintiff's Contentions

I.

At the time and place of the accident, the defendants, and each of them, were negligent in one or more of the following particulars:

(a) In driving and operating said motor truck when the same was not equipped with clearance lamps and reflectors as required by law, or not having the clearance lamps lighted;

(b) In passing another vehicle proceeding in

the same direction as the motor truck when the left side of said highway was not clearly visible and free of oncoming traffic for a sufficient distance ahead to permit said truck to overtake and pass said other motor vehicle in safety.

(c) In driving said truck to the left side of the center line of said highway upon the crest of a grade and upon a curve of the highway where the driver's view was obstructed within a distance of 500 feet.

(d) In overtaking and passing another vehicle driving in the same direction as said truck at an intersection of highways when such movement could not be made in safety:

(e) In failing and neglecting to keep and maintain a proper or any lookout for other vehicular traffic, and particularly for the automobile operated by this plaintiff.

II.

That as a proximate result of the negligence of the defendants and each of them, plaintiff was forced off the road to avoid a head-on collision with the motor truck and caused this plaintiff severe personal injuries, among which were numerous bruises and contusions to the plaintiff's body, severe brain concussion and brain damage, severe physical and mental shock and physical and mental pain and suffering, a severe tearing, twisting and wrenching of the tendons, muscles, ligaments, bones, nerves and soft tissue of her neck, back, pelvic area, right hip and leg, injuries to her upper chest,

and aggravation of pre-existing arrested tuberculosis, from all of which plaintiff was rendered sick, sore, nervous and distressed, that plaintiff has permanent injuries to her head, neck, back, right hip and leg, and the internal organs of her chest, and will be permanently afflicted with the results of aggravation and dissemination of said tuberculosis, and has been damaged in the sum of \$75,000.00 general damages.

III.

That as a proximate result of said negligence of the above-named defendants and each of them plaintiff has incurred doctor, hospital and medical expenses in the sum of \$936.13 to the present time, and will incur further medical expenses.

IV.

That plaintiff is of the age of 34 years with a life expectancy under the American standard mortality tables of 34.29 years; that plaintiff's ability to work and perform physical activities as a result of said negligence of the above defendants and each of them has been permanently impaired, and plaintiff will continue in the future to have pain and suffering.

The foregoing contentions of plaintiff and each of them are denied by defendants, who specifically deny that they were negligent in any particular charged or that any act or omission on their part constituted a proximate cause of plaintiff's injury and damage.

Issues to Be Determined

I.

Were defendants guilty of negligence in any particular as charged and, if so, was such negligence a proximate cause of plaintiff's injury and damage.

II.

What are the amounts of plaintiff's special and general damages.

Jury Trial

Plaintiff made timely request for trial by jury.

Physical Exhibits

Certain physical exhibits have been identified and received as pretrial exhibits, listed on the attached sheets marked Exhibit "A" and "B," the parties agreeing, with the approval of the Court, that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the ground of relevancy, competency and materiality.

The parties hereto agree to the foregoing pretrial order and the Court being fully advised in the premises

Now Orders that the foregoing pretrial order shall not be amended except by consent of both parties or to prevent manifest injustice; and it is further

Ordered that the pretrial order supersedes all pleadings; and it is further

Ordered that upon trial of this cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues of fact and law between plaintiff and defendant as hereinabove stated shall be had.

Dated at Portland, Oregon, this 14th day of February, 1955.

/s/ GUS J. SOLOMON,
Judge.

Approved:

/s/ NELS PETERSON,
Of Attorneys for Plaintiff.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendants.

EXHIBIT "A"

Plaintiff's Exhibits

- A. Series of photographs of scene of accident.
- B. 2 photographs of plaintiff.
- C. Deposition of M. L. Burr.
- D. Hospital records and X-rays of Albany General Hospital.
- E. Hospital records and X-rays of Good Samaritan Hospital.
- F. Hospital records and X-rays of Matson Memorial Hospital.
- G. Hospital records and X-rays of University of Oregon Tuberculosis Hospital.
- H. City of Albany ambulance service statements.

EXHIBIT "B"

Defendant's Exhibits

1. Deposition of Barbara Emily Renfro.
2. Deposition of Harry L. Sears.
3. Deposition of Dorothy S. Walker taken July 27, 1953.
4. Deposition of Dorothy S. Walker taken August 7, 1953.
5. Medical reports and records on plaintiff.

[Endorsed]: Filed February 14, 1955.

In the United States District Court
for the District of Oregon

Civil No. 7092

DOROTHY S. WALKER,

Plaintiff,

vs.

WEST COAST FAST FREIGHT, INC., a Corporation, and M. L. BURR,

Defendants.

JUDGMENT ORDER

The above-entitled cause came on regularly for trial before the undersigned judge of the above-entitled court on Wednesday, February 23, 1955. Plaintiff appeared in person and by Nels Peterson, one of her attorneys. Defendants appeared by John Gordon Gearin, one of their attorneys. A jury was

duly empaneled and sworn to try the case following which opening statements were made.

Evidence on behalf of all parties was introduced. The trial continued until the day following when, after both parties had rested, arguments to the jury were made and thereafter the court duly instructed the jury as to the law. The jury retired to deliberate and on the same day returned into open court its verdict in words and figures substantially as follows (formal parts omitted):

“We, the jury, duly empaneled and sworn to try the above-entitled cause, do find our verdict in favor of plaintiff, Dorothy S. Walker, and against defendants and assess plaintiff’s damages in the sum of \$1,500.00.”

Said verdict was duly received and filed and based thereon and the court being fully advised in the premises,

Now Orders that plaintiff have and recover judgment against defendants, and each of them, in the sum of \$1,500.00, together with costs and disbursements incurred herein taxed at \$100.69.

Dated at Portland, Oregon, this 24th day of February, 1955.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed February 28, 1955.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly empaneled and sworn to try the above-entitled cause, do find our verdict in favor of the plaintiff, Dorothy S. Walker, and against the defendants, West Coast Fast Freight, Inc., a corporation, and M. L. Burr, and each of them, and assess plaintiff's damages in the sum of \$1,500.00.

Dated this 24th day of February, 1955.

/s/ MARION I. GREEN,
Foreman.

[Endorsed]: Filed February 24, 1955.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Comes now plaintiff and moves the court for an order setting aside the judgment order heretofore made and entered in the above-entitled cause and granting a new trial to the plaintiff upon the question of damages only on the ground and for the reason that errors at law were committed in the trial of said cause which prevented the plaintiff from having a fair trial and which substantially affected the verdict in said cause. That the errors at law were as follows, to wit:

1. In advising counsel for the plaintiff during opening statement that said counsel's reference to pain and difficulties from pregnancy and childbirth of the plaintiff subsequent to the injuries complained of should not have been referred to and were not admissible upon trial, without objection made by counsel for defendants. Plaintiff contends that such facts were admissible under the pretrial order and the issues in the case.

2. In refusing to permit plaintiff to prove by expert medical testimony the effects of the injuries to her lower back, known to medical science as lumbo-sacral sprain, and displacement of her coccyx.

3. In refusing to permit plaintiff to testify as to the effects in the nature of pain and suffering and the difficulties of pregnancy and childbirth, arising from the injuries complained of.

4. In rejecting plaintiff's offer of proof in respect to the foregoing.

5. In failing and neglecting to give plaintiff's requested instruction contained in plaintiff's requested instruction No. 8 as follows:

“If you find that plaintiff's injuries are permanent, then you will take into consideration plaintiff's life expectancy.

“You are instructed that under the Standard American Mortality Tables, a person of the age of thirty-five years has a life expectancy of 33.44 years. However, plaintiff's life expectancy is a question of fact for you to determine, taking into consideration plaintiff's age, sex, health, habits and nature of her occupation, whether hazardous or not.

“You will also take into consideration whether plaintiff's injuries, if any, permanently impaired her ability to work and perform physical activities.”

6. Misconduct of the jury in failing and neglecting to follow the court's instructions in respect to assessing general damages to the plaintiff, and in assessing an inadequate sum for plaintiff's injury and damages as shown by the evidence in the case.

7. Inadequacy of the verdict.

Plaintiff respectfully contends that the foregoing statements, rulings and orders of the court

constitute errors at law and the failure of the jury to follow the court's instructions in respect to damages and in assessing an inadequate sum of money to the plaintiff as damages, were prejudicial and prevented the plaintiff from having a fair trial.

That the foregoing assignments of error are reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.

That plaintiff presents the foregoing motions for a new trial pursuant to Rule 59, Rules of Civil Procedure and will rely upon the following authorities:

15 Am. Jur., Section 78;

Nevila vs. Ironwood, 232 Mich 316;

50 A. L. R. 1189;

Hively vs. Higgs, 120 Or. 588;

53 A. L. R. 1052;

15 Am. Jur., Section 82;

Beals vs. Quigg, 11 P. 2d 354 (Ariz. 1932);

Bucktrob vs. Partridge, 265 P. 768
(Okla. 1928);

106 A. L. R. 874 [Citing Towel vs. St.
Joseph (Mo. 1916)];

Robin vs. Bartlett, 64 N. H. 426;

Samuels vs. Calif. St. Cable Co.,
124 Cal. 294;

- Tredwell vs. Whittier, 80 Cal. 574;
Denver Ry. vs. Harris,
122 U. S. 597, 7 S. St. 1286;
Jordan vs. Great Western Motorways,
2 Pac. 2d 786 (Cal. 1931);
102 A. L. R. 1516;
Shaw vs. Pacific Supply Company,
113 Pac. 2d 627;
Westfall vs. Kern,
43 Pac. 2d 392 (Col. 1935);
Safeway Cab Service Co. vs. Minor,
70 Pac. 2d 76 (Okla. 1937);
Sporable vs. Thomas,
33 Pac. 2d 721 (Kans. 1934);
Foster vs. Hudson,
92 P. 2d 959 (Cal. 1939);
Aune vs. Oregon Trunk Ry.,
51 P. 2d 663 (Ore. 1935);
Fuermbeck vs. Hanson,
75 P. 2d 1027 (Utah 1938);
Vowels vs. Missouri P. R. Co., 320 Mo. 34;
Pollock vs. Ham, 177 Ark. 348 (1928);
Hutches vs. Renfrow, 200 F. 2d 337 (CA5);
Zellem vs. Herring.
102 F. Supp. 105 (DC PA);
Caldwell vs. Southern Pacific Co.,
71 F. Supp. 955 (DC Cal);

Spero-Nelson vs. Brown,
175 F. 2d 86 (CA 6)

Snyder vs. Portland Traction Co.,
182 Or. 344, 185 P. 2d 563;

Frangos vs. Edmunds,
179 Or. 577, 173 P. 2d 596.

/s/ NELS PETERSON,

/s/ FRANK H. POZZI,

/s/ BERKELEY LENT,

Attorneys for Plaintiff.

Affidavit of Mail attached.

[Endorsed]: Filed March 7, 1955.

In the United States District Court
for the District of Oregon

Civil No. 7092

DOROTHY S. WALKER,

Plaintiff,

vs.

WEST COAST FAST FREIGHT, INC., a Corporation, and M. L. BURR,

Defendants.

ORDER

Plaintiff's motion for new trial came on regularly for hearing before the undersigned judge of the above-entitled court on Monday, March 21, 1955, plaintiff appearing by Nels Peterson, of her attorneys. and defendants appearing by John Gordon

Gearin, of their attorneys. The court having heard argument and being fully advised in the premises and of the opinion that the motion is not well founded and for good cause shown,

Now Orders that plaintiff's motion for new trial be and the same hereby is denied.

Dated at Portland, Oregon, this 21st day of March, 1955.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed March 23, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Dorothy S. Walker, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on the 24th day of February, 1955, and from the whole thereof.

Dated this 11th day of April, 1955.

PETERSON & POZZI &
BURTON J. FALLGREN,

By /s/ NELS PETERSON,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 11, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, Dorothy S. Walker, plaintiff in the above-entitled suit appeals to the U. S. Court of Appeals, Ninth Circuit, from a judgment entered in the U. S. District Court for the District of Oregon on the 24th day of February, 1955, in favor of the Defendants in said action and against said Plaintiff and from the whole thereof.

Now, Therefore, in consideration of the premises, and of such appeal, we, Dorothy S. Walker, as Principal, and the Maryland Casualty Company, a Corporation organized under the laws of the State of Maryland, and duly authorized to transact an surety business in the State of Oregon, as surety, do hereby jointly and severally undertake and promise on the part of the said Plaintiff and Appellant, the said Dorothy S. Walker, that said appellant will pay all court costs and disbursements which may be awarded against her on said appeal.

Dated this 7th day of April, 1955.

/s/ DOROTHY S. WALKER,
Principal.

MARYLAND CASUALTY
COMPANY,

[Seal] By /s/ KATHLEEN BROPHY,
Attorney-in-Fact.

[Endorsed]: Filed April 12, 1955.

[Title of District Court and Cause.]

ORDER

Based upon the records and files in this case, and the motion of plaintiff, appearing by and through her attorneys, it is hereby

Ordered and Considered that the Clerk of this Court be, and he is hereby directed to, forward with the record on appeal the exhibits in this cause to the Clerk of the United States Court of Appeals, Ninth Circuit, San Francisco, California.

Dated at Portland, Oregon, this 12th day of April, 1955.

/s/ GUS J. SOLOMON,

United States District Judge.

Service of Copy acknowledged.

[Endorsed]: Filed April 12, 1955.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,

County of Multnomah—ss.

I, John Gordon Gearin, being first duly sworn, depose and say: That I am one of attorneys for defendants in the above action; that I have been in charge of the case insofar as the defendants are concerned since its inception; that at no time did

I have any knowledge that plaintiff sustained or was going to claim an impairment of the child bearing functions or difficulties in child bearing until plaintiff's attorney first attempted to advise the jury of such claim at the time of trial.

/s/ JOHN GORDON GEARIN.

Subscribed and sworn to before me this 21st day of March, 1955.

[Seal] /s/ NOELLE BURTON,
Notary Public for Oregon.

My commission expires March 10, 1956.

Service of Copy acknowledged.

[Endorsed]: Filed April 13, 1955.

United States District Court
District of Oregon
Civil No. 7092

DOROTHY S. WALKER,

Plaintiff,

vs.

WEST COAST FAST FREIGHT, INC., a Corporation, and M. L. BURR,

Defendants.

February 23, 1955, 10:00 A.M.

Before: Honorable Gus J. Solomon, District Judge,
With a Jury.

Appearances:

NELS PETERSON,

Of Attorneys for Plaintiff;

JOHN GORDON GEARIN, and

JAMES BJORGE,

Of Attorneys for Defendants.

TRANSCRIPT OF TESTIMONY AND
PROCEEDINGS

(The jury having been duly empaneled and sworn, the following proceedings were had:)

Mr. Peterson: Could I ask leave of the Court in my opening statement to refer to two exhibits that have not been marked? They were marked at the time of the pre-trial, your Honor. I have shown them to counsel.

The Court: Is there any objection?

Mr. Gearin: No, your Honor.

Mr. Peterson: May it please the Court, counsel, ladies and gentlemen of the jury:

I assume that you have sat, every one of you, on juries before so that you understand generally your duties and the procedure in court in trying these civil actions. My name is Nels Peterson. I am the attorney who represents the plaintiff in this case who is Dorothy S. Walker. This is an action brought against West Coast Fast Freight, Incorporated, which is a corporation and operates a truck line in Portland, within the State of Oregon,

and elsewhere. I assume that you all understand that an opening statement is for the purpose of trying to outline your client's case to you so that you may follow the evidence.

I want to say to you that anything I say in this opening statement or the argument is not evidence. The matters that you determine in this case must be based upon the evidence, and what an attorney says—and that is both true of myself and Mr. Gearin—is not evidence.

Dorothy Walker is thirty-five years of age. She went to Toledo High School down in Toledo, Oregon, in Lincoln [1-A*] County. She and her husband, Gilbert Walker, who sits back in the back of the courtroom, were married there in 1937. Mr. Walker has been a logging truck driver, and in the 40's Mr. and Mrs. Walker owned some logging trucks in Toledo. Mr. Walker's principal business has been that of a logging truck driver and owner.

In 1949, I think it was, Mrs. Walker had a recurrent or constant temperature. She lost some weight. She became concerned about her condition, and it was finally diagnosed as tuberculosis of the lungs. I assume that you generally know about that. It is a common disease due to a germ. A person is hospitalized for it in one of the state institutions, may be hospitalized there and receive treatment, and that is what Dorothy Walker did. She entered a state tuberculosis hospital. I think she was there for some period of time. In, I believe it was in 1951 that she was admitted and received

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

treatment. While she was there in the Oregon State Tuberculosis Hospital she became acquainted with a girl whose name is Emily Renfro, who at that time was named Emily Renfro. Miss Renfro, I think, had been in that institution for four and a half years as a tuberculosis patient. In 1953, I think the date was April 27, 1953, Emily Renfro was released from the tuberculosis hospital, discharged from the hospital as an arrested tuberculosis case. Now, Mrs. Walker had been released sometime prior to that as an arrested tuberculosis patient, and by arrested I mean to say, as I understand it, [1-B] the disease, the germ becomes latent and so that it is not communicable to other people, and it is what they refer to as arrested tuberculosis.

On May 3rd or May 2nd, actually, Mrs. Walker and Emily Renfro left Newport, Oregon, which is in Lincoln County, to drive back to Portland. Now, as I remember it, as I recall, it was on a Saturday night. Mrs. Walker was driving a 1949 Buick car. In order to come back to Portland, she drove inland, that is to say, she did not take the Coast Highway. She drove inland and drove to Albany on Highway 99E, which is a highway which runs in a generally northerly and southerly direction. I assume that most of you are familiar with that highway.

Approximately five miles north of Albany, Oregon, is a juncture of highways known as Jefferson Junction or the Jefferson Cloverleaf. The highway at this point is relatively straight except there is

a rather wide curve in it. There is no bridge, but there is sort of a circle of the Jefferson Highway, and there is this Junction.

Mrs. Walker was driving north on Highway 99E with Emily Renfro sitting alongside of her in the front seat. So that you might better follow the evidence in this case, there has been taken two aerial photographs of the highway that is involved in this case. The point of the highway that is involved in this case, referring first to the one which is the one showing the longest view of the highway, you can see in this aerial photograph—the light is not too good here, but I assume you can all see it—this is looking north-south. When you are looking at this picture you are looking in a general northerly direction. Now, that is the direction that Dorothy Walker was driving the car. Here is this circle that I referred to. This is what is called Jefferson Junction or the Jefferson Cloverleaf. This direction is east; this direction would be west (indicating). If you could see that far enough, you would see Salem. You cannot quite see it in here, but this is south of Salem, being about five miles north of Albany. After this cloverleaf here there are two highways or two methods of getting onto Highway 99E. The one that you are particularly concerned with here is this one which goes off to the east, to the right-hand side of the highway (indicating).

Now, showing it a little bit closer, this is the same highway, and this is looking in an easterly direction so that you see here, and this direction would be north, and this direction would be south.

This direction is east, and the intersection that I referred to is this one right here where the highway goes out this way, and I believe Jefferson proper is out here, I am not sure. It is called Jefferson Junction.

Dorothy Walker in driving along here was driving here (indicating). The accident that we are concerned with occurred right about at this point, and I am referring to the [1-D] point that is, well, some distance north of where the east highway, the Jefferson Highway runs into 99E. I believe they had made a stop in Albany, but I am not sure of that. In any event, as they were driving along Emily Renfro was turning, or turned the dial on the radio and made some remark to Mrs. Walker as to the time, and Mrs. Walker's time was faster than hers, and so she was turning on the radio to change to a different station, and she said, "Well, it is one o'clock in the morning. We will get the correct time in just a minute." Now, that was just a few moments. I don't mean minutes; I mean moments, intervals of time, very shortly before this accident happened. Dorothy Walker was driving along the highway going forty-five to fifty miles an hour, coming along this relatively straight stretch of highway at night. She had her lights on. The condition of the weather was reasonable good. As she came, she approached this intersection—as she came down this highway she saw some distance away, and I am not sure whether she could estimate the exact distance, but she saw four headlights approaching as though she was meeting two cars,

and she saw these four headlights, and they appeared to be one alongside of the other. She assumed that there was one car passing another car. It looked like they had plenty of time, or the car that was attempting to pass had plenty of time to get around. It looked to her like that, and she continued to drive on, and I think took her foot off the accelerator, and finally, when she saw, when she got at this relatively close distance—I think it was two or three hundred feet, something like that, or less—she saw that it was a truck, a truck that did not have the clearance lights on it. The truck was coming up a slight—up a grade, and by referring to a truck I mean actually it is a tractor and two trailers, and I think that the over-all length of that truck is about 70 feet.

Mr. Gearin: Sixty, Mr. Peterson.

Mr. Peterson: Well, sixty. I have not measured it, 60 feet.

This truck was passing or in the act of passing a car, and when she got up so that she could see that it was a truck passing a car and there was no alternative for her to either hit head-on into the truck or go into the bank, as she looked up she saw the aluminum top of the truck with the words written on the front of it, "West Coast." She saw that just before she turned off of the highway. When she saw what was going to happen or when she saw what the condition was she made a remark like "My God, Em,——" that means Emily—"it is a truck, and we can't get by." So the next thing

she did was to turn off of the highway, and in turning off of the highway she went down the bank.

As it turned out, she did not—the car did not overturn, but she headed straight down the bank. As soon as she got over the bank the front door on the right came [1-F] open, and Emily Renfro was thrown out of the car. The car went down this rather steep bank head first and came down to the bottom of the ditch.

Mrs. Walker remembers going down the bank, and the next thing she did remember she was in the front seat, and her legs were up in the air, and she had been unconscious. It was at night, and neither the truck nor the other car had stopped. She did not know how long it was before she became conscious. When she became conscious she called out to Emily, and after so long a time Emily answered her. Emily was up some way, somewhere upon the bank. It was dark, and no one was around.

Finally, Mrs. Walker got out of the front seat of the car. She had asked Emily if she was hurt, and Emily said, “Yes, I think my back is broken,” or something like that, something to that effect. Mrs. Walker said, “Lie where you are.” Mrs. Walker was unable to walk herself when she got out of the car but started to crawl up the bank. She managed to get up to the level of the highway, and she does not know how long it was, but it was around two o’clock when a passing motorist saw the car headlights on and stopped. When he saw what had happened an ambulance was called, the state police, and she and Emily were taken into

the Albany General Hospital by ambulance. They were kept there for that day. It became known that Mrs. Walker was an arrested tuberculosis patient. They referred her to the Matson Memorial Hospital [1-G] in Milwaukie. When she was in the hospital at Milwaukie, she had had some lucid intervals, she became conscious and unconscious several times. She was unable to walk, had pain in her back and right hip. Her chest was troubling her. She was spitting up a bloody sputum, or there was blood coming from the injury to her chest.

She was taken by ambulance on May 3rd, which was the same day, I think, late in the afternoon, to Matson Memorial Hospital in Milwaukie. She entered there for, I think, one or two days, and then was transferred to Good Samaritan Hospital in Portland. She came under the care of the regular attending physician who was Dr. John Tuhy who is a chest specialist. He called into consultation for the back and hip injuries Dr. Abele, his associate, who is a specialist, a bone specialist, who treated her for the back and for the hip injuries. Dr. Philip Selling who is a neurologist was called into consultation to treat her for the symptoms she had of concussion. She remained in the Good Samaritan Hospital, I think, until the latter part of May. She was sent home in a wheelchair.

The thing that caused her the most difficulty was her right hip and her back. She remained home for four or five days, and then she was sent to the Tuberculosis Hospital which is up on Marquam

Hill, and she stayed there for about six weeks. The purpose of sending her to the TB hospital was to attempt to follow this tuberculosis, because, as I understand [1-H] it, Dr. Tuhy suspected that this would cause the tuberculosis to revive and become communicable and that there might be some dissemination of the tuberculosis through a greater area of her lungs. She had had a pneumothorax, and, as I understand it, that it where they collapse the lung. She had had that before.

She remained in the Tuberculosis Hospital here in Portland for that six weeks. Then she was released on crutches, I think that is correct. In any event, she had difficulty with her back and with her right hip. She has continued under the care of those doctors that I have mentioned from that day until today.

This is what I understand from Dr. Tuhy is wrong with her. She had a bruise of the lung as evidenced by the bloody sputum and the other symptoms which she had which the doctors will explain to you. I think the doctor will testify in respect to the bruised lung that the doctor can now be relatively certain that there was no dissemination of tuberculosis so that her tuberculosis is relatively good. She is an arrested tuberculosis patient. The only thing that she had was the bruised lung, and there was no dissemination or serious aggravation of this tuberculosis of the lung she had, but Dr. Selling, as I understand, did a brain test on her by means of what is call an electroencephalogram. That is, as I understand it, an elec-

trical device that they run through the head, run an electrical [1-I] current through there, and if you have an abnormal condition or brain damage it shows up in the electroencephalogram; it was done on her, and he found what is called an abnormal electroencephalogram.

Mr. Gearin: Your Honor, I dislike to object, but I am reading the pre-trial order, and it does not show anything that Mr. Peterson has told us about. This is all strange to us. It was not until this morning that they were advised that she had been examined by Dr. Philip Selling. In fact, the deposition disclosed that she told us she had not been, other than by Dr. Tuhy. I object to it at this time.

The Court: He said brain concussion and brain damage. He alleged that.

Mr. Gearin: Very well, your Honor.

Mr. Peterson: As I understand it from Dr. Selling, she had what is called brain concussion and some brain damage as shown by this electroencephalogram and that, however, she has had a good improvement from it. She has recurrent headaches at the present time. The doctor thinks she will have those for several years to come but there eventually will be no permanent residual brain damage from that.

The most serious thing she has, as I understand it, Dr. Abele says there has been an injury to what is called the coccyx, which is the tail bone. The tail bone consists of several small vertebrae, and she has displaced that so that it is now crooked. It

is not in the right place, and it is [1-J] constantly painning her so the Dr. Abele thinks it should come out. He will put her in the hospital for a couple of weeks and surgically remove her coccyx, her tail bone.

That, as I understand it, he says she has a lumbo-sacral sprain which is a sprain of the low back.

Now, she has a thing which causes difficulty to her which, as I understand it, is a congenital anomaly of the spine. It is referred to as spina bifida occulta. As I understand that medical term, it means simply that there has been in her low back, she was born as some persons—I think the percentage is relatively high, 10 or 15 per cent of the people are born with some abnormality, that the spine does not develop quite as it should so that with this abnormality if you get sprain or strain with a structurally weak back like that, they have a lot of trouble with it, and it is difficult to treat. That is what Mrs. Walker has. As I understand it, you will see some X-rays and hear the doctors testify about it.

The doctor says after this coccyx is removed she must wear a corset or back support, and if she gets no relief from that, then a spinal fusion should be performed upon her. You will hear the doctor explain what a spinal fusion is. That is what this case is about as far as the injuries are concerned.

This action is brought against West Coast Fast Freight, Incorporated and against one M. L. Burr. Mr. Burr, [1-K] as I understand it, was a truck driver employed by West Coast Fast Freight. I

took Mr. Burr's deposition in Seattle, Washington, a year ago.

Mr. Gearin: I took his deposition.

Mr. Peterson: Yes, you did, and I was in attendance. We had your attorney there, and I was in attendance. I cross-examined him.

Mr. Gearin: That is right.

Mr. Peterson: The plaintiff's contentions in this case are largely one of violations of the statutory law in the State of Oregon, and I should tell you just in passing, explain what I understand the evidence is concerning operation of these large trucks.

The West Coasts Fast Freight has a station in Portland, Oregon, where they keep many of their large trucks. These trucks run in to various cities other than Portland. They run from Seattle, I think, to Portland; from Portland to various places. Now, when these trucks are operated, if it is just a relatively short run they are operated by one driver. If it is a long run, they have relief drivers. Under the statutory law of the State of Oregon, when a truck is being operated at night they have to have certain lights on them. The statute specifies what those lights should be, and the Court will explain that to you. They must have what are called clearance lights to indicate the width of the truck. They must have marker, side marker lamps to indicate whether [1-L] it is a truck. They must have certain reflectors reflecting an amber color so that when a truck is operating at night these, under the law, are required to be on the truck and trailer and to be lighted, and they are to be placed in such position

that they are not to be obscured by mud or dust or debris that comes from the wheels of the truck on these.

We will expect to show in this case that the truck that was involved has a—or the truck and trailers have a certain number, and we expect to show that this truck and trailer was checked out, I believe, at 10:57 or 10:47 but actually did not leave Portland, Oregon, until about 11:30; that it was bound for, I believe, a California point, I believe Oakland, California; that this truck was being operated by Mr. Burr and was headed in that direction. We expect to show that at that point at 1:00 o'clock in the morning on that morning that that truck was at the Jefferson Junction.

Now, I believe it was the position of the defendants here that they had no responsibility, were not at the scene of the accident. We will expect to prove that to you.

We charge the driver of the truck and this West Coast Fast Freight, too, with negligence first in driving and operating the truck without proper clearance lamps and reflectors as required by law, and, second, in passing another vehicle proceeding in the same direction as the motor truck when the left side of the highway was not clearly visible [1-M] and free of oncoming traffic for a sufficient distance ahead to permit said truck to overtake and pass said automobile in safety.

The next charge of negligence we make is in driving said truck to the left side of the center line—center of the highway upon the crest of a grade and

upon the curve of the highway where the driver's view along the highway was obstructed within a distance of 500 feet.

Next we charge him with overtaking and passing another vehicle driving in the same direction as said truck at an intersection of highways when the same could not be done with safety.

Next, in failing and neglecting to keep and maintain a proper or any lookout for other vehicular traffic, and particularly for the automobile operated by this plaintiff.

Those contentions are denied by the defendants in this case.

You will see other photographs taken on May 3rd on the exact date of this accident by Mrs. Walker's son, Gary, who is seventeen. You will see hospital records and X-rays taken by these various physicians. You will hear the testimony of Mrs. Walker, her husband, Miss Emily Renfro who is now, whose name now is Mrs. Emily Batten. She has since been married.

One other point I do want to mention to you, that since the accident of May 3, 1953, Mrs. Walker has had a [1-N] child. She had a baby last October. The child is home. She had some considerable difficulty with the child as far as these injuries were concerned; nonetheless, the baby is alive and normal——

The Court: Mr. Peterson, this is the second or third time that you have gone beyond the pre-trial order. There is nothing in the pre-trial order about

spina bifida occulta aggravation, and now you are telling us about conditions with reference to the birth of a child. These are not in the pre-trial order. You have had plenty of opportunities to do it. You are not an inexperienced lawyer. I do not think that this should be done.

Mr. Peterson: Your Honor, in respect to the spina bifida occulta, as I understand it, the testimony of the doctor will be there is no aggravation of it, and in respect to the childbirth, counsel is aware of that. He has had her examined recently, and I believe it proper under the charge of pain and suffering.

The Court: Do not do it any more.

Mr. Peterson: Ladies and gentlemen, I hope that you will pay close attention to the evidence in this case and see that justice is done. Thank you.

Mr. Gearin: Ladies and gentlemen, Mr. Peterson has expressed a thought that perhaps you know what these cases are all about. I know that you have served on other cases before, and I know that some of you recall my trying cases [1-O] here before you not so long ago, and you know by this time that there are two sides to every case.

I merely want to say that we had no information concerning this alleged accident until sometime in the latter part of May when we received a letter from Mrs. Walker's attorneys, Kliks and Kliks.

Of course, you will understand from the nature of the charge that it is one of those charges that is difficult to disprove. Our testimony will be the testimony of Mr. Burr who no longer works for us, who

lives in Seattle and who is a representative of the Teamsters Union and cannot be here at the trial. His testimony will be before you. He will tell you under oath that he checked his lights before he left; that he was down somewhere in that vicinity sometime around the time that they say he was; that he did not crowd any car off the highway, and that he did not make what we call in trucking language a "bad pass."

In addition to that, we have the testimony of others who have some knowledge about it which, we believe will cast some doubt upon the plaintiff's story of what happened. First of all we will call as a witness Mr. Duane Lehr who at that time was the Marion County Deputy Sheriff. He will testify that he arrived at the scene of the accident when there was some people there; that he was coming up from a job, he had a side job that night; that he saw that there was something the matter. He stopped and talked to Miss Renfro, [1-P-Q] and he talked to the plaintiff. He will tell you about their condition. Suffice it to say, briefly, that his testimony will be that he asked Mrs. Walker what happened. She said, "A truck forced me off the road." He said, "Well, what kind of a truck was it?" She said, "It was a silver truck." "Well, don't you know anything else about what kind of a truck it was?" And, at that time she said she could not tell him what kind of a truck it was. He asked Miss Renfro what happened, and she told the Deputy Sheriff that she didn't know what happened.

Our next witness will be Mr. Walden Waddle who

was the tow truck operator. He will tell you the circumstances of his going down there, a Buick car that he had been advised had been wrecked so he brought his wrecker out there, and when he got to the scene of the accident he was down—we have some pictures not taken from the air but taken from the ground, and you can see the car went over somewhere along in here (indicating). The witness will tell you that when he got down there he saw the car, and the car had absolutely no damage to it; that he got in and drove it out to the other end where there was a ditch, and he had to put a cable across it to get it across the ditch, but the car was in drivable condition and could have been driven back to Albany. The reason he did not drive it back was because he was alone, and if he drove it back there would be no one to take his tow truck back so he just hitched it up. [1-R]

The next witness will be Mr. A. C. Payne, who operates a truck service at Eugene. Mr. Payne services, among other trucks, all the trucks of the West Coast Fast Freight that go north and go south, and they all stopped in there to be checked. In view of the charge made that we did not have any lights on the truck, Mr. Payne will testify he has checked his records for that twenty-four hour period, and there were no West Coast Fast Freight trucks that came in there and required any work done on their lights.

Our next witness will be Mr. William T. Ewing, who at that time, at the time of the accident, was a member of the State Police force, and he investi-

lives in Seattle and who is a representative of the Teamsters Union and cannot be here at the trial. His testimony will be before you. He will tell you under oath that he checked his lights before he left; that he was down somewhere in that vicinity sometime around the time that they say he was; that he did not crowd any car off the highway, and that he did not make what we call in trucking language a "bad pass."

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Our next witness will be Mr. William T. Ewing, who at that time, at the time of the accident, was a member of the State Police force, and he investi-

(Testimony of Dorothy S. Walker.)

home and returned in February of 1952 and stayed until April. I again left the Salem Hospital and was under private treatment by Dr. John Tuhy for approximately one year.

Q. Mrs. Walker, did I understand the latest that you were released from the tuberculosis hospital was what month of what year? A. April of 1952.

Q. 1952. Now, again on May 2, 1953, were you driving a 1949 Buick automobile? A. I was.

Q. What was your destination?

A. Portland.

Q. Where had you left from?

A. I had left my sister's home in Siletz, Oregon.

Q. Where is Siletz, Oregon?

A. Well, it is near Newport.

Q. Was anyone in the car with you?

A. Yes, Emily Renfro.

Q. How did you become acquainted with Emily Renfro? [3]

A. Emily and I were roommates in the TB hospital.

Q. What was the purpose of her accompanying you in the car?

A. Well, she had just gotten out of the hospital after nine continuous years in different TB hospitals, and she had not been anywhere for a long time, and I asked her if she would like to ride down with me and visit my sister, and she said yes, and we went.

Q. Did your sister live in Portland, Oregon?

A. No, in Siletz.

(Testimony of Dorothy S. Walker.)

Q. Then what was your destination in Portland, Oregon? A. My home.

Q. After leaving Siletz——

A. I was coming home.

Q. What course did you follow after you left Siletz?

A. We started up what is called the River Road toward Kernville, and I had left my pocketbook in Newport, had forgotten it in Newport, so when we got to Kernville we turned back down the Coast to pick up my purse. On the Coast it was rainy and drizzly, and Mrs. Renfro was nervous about the Cape and the highway so I told her I did not have to go back that way, it was just as close to go through Albany and Salem and into Portland that way if she felt any better, so that is what we did. We went back, got my purse left directly from Newport to Portland. [4]

Q. In coming from Newport what was the first towns that you came to of any size after leaving Newport? A. That would be Toledo.

Q. Then from Toledo to Corvallis?

A. Yes.

Q. Then the next town was Albany?

A. Yes.

Q. At any of these towns did you make any stops? A. I stopped in Albany.

Q. Mrs. Walker, approximately what time was it when you stopped at Albany, Oregon?

A. Oh, probably, maybe twenty-five to one. We had some coffee, and I think it must have been

(Testimony of Dorothy S. Walker.)

around a quarter of one until, when we left Albany.

Q. Would you tell the jury what happened, in your own words, after you left Albany, Oregon?

A. We were driving north toward Portland between Albany and Salem, and I was driving, I think, approximately forty-five to fifty miles an hour. I don't look at the speedometer. I couldn't be too positive. As we came around the top of this curve, and it is an incline that goes down and across this overpass and detour, a built up junction sort of thing, I saw two headlights, two sets of headlights approaching, and they seemed to be even with each other, and I assumed it was one car passing another car. There would have been plenty of time had it of been two cars. I slowed down a little like you do, automatically, [5] to make sure there was plenty of room, and as I got closer I realized that the one set of headlights were not gaining very much on the other set. I started slowing a little more, in fact at that time quite rapidly, and then as we approached these two sets of headlights I saw, approximately, maybe 100 feet away, I saw that it was a truck towing a trailer. The trailer was silver, and the truck was red, and just as we got to it I said something to Mrs. Renfro that we couldn't are not going to get—that the truck was partially past the other car, he would not have anywhere to go either crowding him over but to stay in our lane. I don't remember what I said to her just at this time, something to the effect that it was a truck and that we were

(Testimony of Dorothy S. Walker.)

going over, and just as we got to it where I had to turn abruptly out of the way I distinctly saw written across the top of this truck in red writing—across the top of the trailer, I mean, not the truck itself—“West Coast.” They are distinctive trucks, and they are very plain, and I saw it, and then we went over the bank. It was either go over the bank or hit the truck head-on.

Q. When you went off from the bank, did your car go down? A. Yes.

Q. Approximately how far down did you go?

A. I could estimate approximately 50 feet. I am not very good at judging distance, but I would estimate that.

Q. Have you been back to the scene of the accident since it [6] occurred?

A. I have driven past there one time recently.

Q. Do you know what happened to Emily?

A. At the time of the accident?

Q. Yes.

A. Yes, Emily was either thrown or jumped from the car, I don't know which, as we went over the bank, and she apparently rolled to the bottom because she was at the bottom when I called to her and she answered me.

Q. What is the next thing that you remember after you went over the bank?

A. Well, the next thing I remember is coming to in the bottom of the car, and I had been coughing blood and had vomited some. It was all over me, and I noticed that Emily, realized, of course, that

(Testimony of Dorothy S. Walker.)

Emily was not in the car, and I called to her, and she did not answer. I dragged myself out of the car and called to her more loudly, and she answered over in the distance. I asked her if she was injured, and she said——

Mr. Gearin: We object to any conversation, your Honor, as being hearsay.

The Court: Objection sustained.

Q. (By Mr. Peterson): Do you know the interval of time that you were unconscious?

A. No, Mr. Peterson, I don't. I could estimate the time [7] by the time we know we went over and the time that we were found.

Q. All right, how do you fix the time that you went over, if you can?

A. I know what time it was when we left Albany, and we were wondering about what time we would get home, and Mrs. Renfro had said that she had a certain time on her watch, and mine was a little different, and she said, "Well, I will turn on the radio. It is just a few minutes to one, and we will get the correct time at one o'clock." And she was in the process of tinkering with the radio just before the accident.

Q. What was the interval of time then until anyone came to help, if they did?

A. I think about an hour.

Q. What did you do in that interval?

A. Well, after I became conscious and got out of the car and called Mrs. Renfro, I started to crawl up the bank, and I would get a little ways, and then

(Testimony of Dorothy S. Walker.)

I guess I lost consciousness again. I don't know. I know I have a recollection of starting two or three times to go up the bank, and I don't believe that I had quite gotten to the top when I understand it was a truck driver of another freight truck who saw our lights down below the hill, and, to my knowledge, he was the first person there.

Q. How long did you remain there at the scene of the accident before you were removed, if you were removed? [8]

A. I am not too sure about the exact amount of time that it would take someone to notify the ambulance and for it to get out there. I think we checked in the hospital at Albany around two-thirty.

Q. How did you get into the hospital?

A. By ambulance.

Q. Did you walk to the ambulance?

A. No, I did not.

Q. How were you put in the ambulance?

A. I was put on a stretcher.

Q. Do you know of your own personal knowledge whether that was employed also with Emily?

A. I am sure that it was.

Q. Do you recall talking with a Duane Lehr who has been referred to here as the Marion County Deputy Sheriff?

A. I recall talking to some gentlemen at that time. In fact, he may be the man who put a blanket under my head and kept my face out of the mud.

(Testimony of Dorothy S. Walker.)

That is the only one I can remember talking to, and he asked me what kind of a truck it was.

Mr. Gearin: We object to the conversation with an undisclosed individual, your Honor. She says she does not recall the officer.

The Court: Objection sustained.

Q. (By Mr. Peterson): Mrs. Walker, when you arrived at the [9] hospital in Albany would you tell the jury what treatment was given to you, if any treatment was given to you?

A. Yes, we had a shot of, I don't know, of some sort of pain killer, and we had always been told that if we were involved in an accident to be sure to notify the attending physician that we were tuberculosis patients. In fact, I had it written on my driver's license, and when they found out that we were tuberculosis patients they put us in a room all by ourselves maybe assuming that we were contagious, I don't know. Anyway, they didn't wash us, anything like that. They did give us shots and took care of my bleeding lung, immediately brought me a pan and thinks like that, and then they had us notify the tuberculosis hospital which was at Matson Memorial, Milwaukie, to send an ambulance, after us.

Q. Mrs. Walker, at the Albany Hospital were any X-rays taken of you?

A. I think one or two.

Q. Do you know what portion of your body was X-rayed?

(Testimony of Dorothy S. Walker.)

A. I believe my neck and, I think, my lower back.

Q. What symptoms of pain or distress did you have from the time—or immediately after the accident when you became conscious and while you were in the hospital?

A. I had—of course, my head was aching, and I had what they called muscular spasm, extremely tight muscular spasm in the back of my neck, and my back hurt and my legs hurt. I was more concerned at that time about coughing blood. I [10] was concerned because of my TB more than anything, and my chest was quite painful.

Q. Did you cough blood constantly, or did you cough it frequently?

A. Frequently.

Q. Was there any quantity of blood, or was it just colored sputum?

A. No, red blood.

Q. How long did you cough blood immediately following the accident?

A. You mean how long did it reoccur?

Q. Yes.

A. Well, all the time I was in Good Samaritan Hospital. I would presume about a month.

Q. How long did you remain in the Matson Memorial Hospital?

A. Just overnight at Matson Memorial.

Q. Were any X-rays taken of you at Matson?

A. Yes, they were.

Q. Do you know what parts of the anatomy?

A. My hip, pelvis area, and, of course, my chest.

Q. Then where were you taken?

(Testimony of Dorothy S. Walker.)

A. To Good Samaritan Hospital.

Q. About when was it that you arrived in Good Samaritan?

A. I would say the 4th of May.

Q. How long did you remain in Good Samaritan Hospital?

A. Something like about two and a half weeks. I could [11] look it up, but I believe it was about two and a half to three weeks.

Q. Mrs. Walker, during the time that you were in the Good Samaritan Hospital could you tell the jury for us what doctor or doctors cared for you?

A. Dr. John Abele and also Dr. John Tuhy.

Q. Who was the first doctor who saw you at the Albany General Hospital?

A. I thing his name is Dr. Bain.

Q. Who was the doctor who first saw you at Matson Memorial Hospital? A. Dr. Tuhy.

Q. Who was the doctor who saw you first at the Good Samaritan? A. Dr. John Abele.

Q. What treatment was given you at the Good Samaritan Hospital for your injuries?

A. I was put in traction, head and neck.

Q. How long did you remain in traction?

A. Practically all the time I was in the hospital, about two and a half weeks.

Q. Was any other treatment given to you in respect to any other injuries?

A. Drugs for pain.

(Testimony of Dorothy S. Walker.)

Q. Were any casts applied to your body or bandages? A. No. [12]

Q. Would you tell the jury what troubled, what hurt you the most while you were in the Good Samaritan Hospital?

A. Well, my hip and lower back area were the most painful by far.

Q. Mrs. Walker, were you given any treatment for your back or hip?

A. That is what the traction was for.

Q. I see, I thought—was it neck traction?

A. Neck, hip, and back; neck and leg both.

Q. Did that improve your condition any?

A. Well, it eased it, yes.

Q. Did you continue to have any headaches?

A. Well, I still had headaches.

Q. Did you have any dizziness?

A. Yes, dizziness and fainting, oh, for quite some time following the accident. In fact, I still have slight dizziness if I rise too quickly, something like that.

Q. Mrs. Walker, when were you discharged from Good Samaritan Hospital?

A. The latter part of May.

Q. Were you able to walk at that time?

A. No, I was in a wheelchair.

Q. Why couldn't you walk?

A. Because my back and hip, my hip would not support me.

Q. What was the next hospital that you entered?

(Testimony of Dorothy S. Walker.)

advised by someone that these pictures were taken the date and hours that you have mentioned?

A. Well, yes, Gary told me they were.

Mr. Gearin: We have no objection other than to 1-G, your Honor. 1-G has not been sufficiently identified. I do not know what it represents or what it is. We have no objection to the others.

The Court: All the exhibits except 1-G are admitted.

(Photographs previously marked Plaintiff's Exhibits 1-A, B, C, D, E, F, H, I and J were thereupon received in evidence.)

Mr. Peterson: We will offer in evidence, your Honor, the two aerial photographs.

The Court: Is there any objection?

Mr. Gearin: No objection, your Honor.

The Court: They may be admitted.

(Aerial photographs marked Plaintiff's Exhibits 11 and 12 for identification and received in evidence.)

(Discussion off the record.)

(Statements of City of Albany Ambulance Service, May 3, 1953, marked Plaintiff's Exhibit 8 for identification and presented [16] to the witness.)

The Court: What are they?

Mr. Peterson: Those are statements of the Albany Ambulance Service showing that she was picked up by ambulance on May 3rd.

(Testimony of Dorothy S. Walker.)

Mr. Gearin: No, your Honor.

The Court: They may be admitted.

(Documents previously marked Plaintiff's Exhibit 8 for identification received in evidence.)

Mr. Peterson: You may take the witness.

Cross-Examination

By Mr. Gearin:

Q. Mrs. Walker, you have been a plaintiff in damage cases before; have you not?

A. You mean have I been to court?

Q. Yes, seeking damages?

A. No, I have never been in court seeking a damage of the court.

Q. Did you or did you not together with your husband bring action against the C. D. Johnson Lumber Company?

A. Oh, I did not—on a truck that went through a trestle.

Q. You also filed an action against Jake's Restaurant?

A. Yes, but it did not come to court.

Q. I understand some disposition was made of that case? [17]

A. That is right.

Q. When were you married to Mr. Walker?

A. January 4, 1937.

Q. As I understand, you have been divorced a couple of times since?

A. That is right.

(Testimony of Dorothy S. Walker.)

Q. Are you presently married to Mr. Walker?

A. I am.

Q. You went to the sanitarium, as I understand it, in December, 1951, but you have not worked since October of 1951; is that a fair statement?

A. Yes, I would think so. Well, no, sir, I will modify that. I did do a little work in an office here in town.

Q. I was referring to the disposition which you got in your case against the Jake's Crawfish people on July 27, 1953. You were represented by Mr. Peterson in that lawsuit, were you?

A. Yes, I was.

Q. I was referring to page 6, Mr. Peterson, deposition taken by Mr. Williamson when you were in attendance. Question: "That is outside of home—"

Mr. Peterson: Just a minute. Your Honor, I have not had any notice of that. This is not marked as a pre-trial exhibit.

Mr. Gearin: I told you on Monday that I was going to use it. You said you had no objection to it. [18]

Mr. Peterson: You said to me you were going to introduce the complaint in evidence. I said, "I will have no objection to the complaint being introduced in evidence." You said nothing at all about any deposition.

The Court: Why was it not marked as an exhibit here? You could have done that very easily?

Mr. Gearin: That is correct, your Honor. I went over these with Mr. Peterson on Monday. He told

(Testimony of Dorothy S. Walker.)

me about the aerial photographs. I said, "That is fine, anything you want, and anything you want to have identified, fine." He said, "We will do it at the time of the trial," and I told him what I was going to have here.

The Court: Is that right, Mr. Peterson?

Mr. Peterson: Your Honor, I submit I told him I would have the two aerial photographs he had not seen.

The Court: Did you have the two aerial photographs marked as an exhibit?

Mr. Peterson: I did not, your Honor, because they were taken Saturday afternoon.

The Court: You may have those marked as an exhibit, and as long as you did not mark yours I am going to let him do the same thing.

Q. (By Mr. Gearin): I will ask you, at that time in the office of Peterson & Pozzi on July 27, 1953, 10:00 o'clock a.m., there being present Mr. Peterson representing you, [19] Mr. Wayne A. Williamson representing the defendant, if you were asked this question and you gave this answer:

"Q. That is outside the home. I am not concerned with housework but where you received compensation.

"A. I was with a logging business until I went to the sanitarium in December of 1951, but I did work on October of 1951. That is the last month I have done any work."

Did you so testify?

(Testimony of Dorothy S. Walker.)

A. That would be true up until that time; yes, sir.

Q. That was up until 1953?

A. What date in 1953?

Q. July 27, 1953? A. Yes, sir.

Q. Following the accident at Jake's, you had been treated by Dr. Tuhy and had been examined by an orthopedist; had you not?

A. That is right.

The Court: Are you mistaken about that date? That was July, 1953?

Mr. Gearin: The deposition was taken July 27, 1953, after the instant accident, your Honor.

The Court: This accident happened May 3, 1953?

Mr. Gearin: That is correct.

The Court: Proceed. [20]

Q. (By Mr. Gearin): Was your tuberculosis reactivated in this accident at Jake's?

A. I think not now. I did think so at the time.

Q. You were hospitalized after that, were you not? A. Very briefly.

Q. Did you sustain bruises and contusions to your body at that time in the fall at Jake's?

A. Yes, I did.

Q. Did you sustain fracture of the rib?

A. No, I don't think that the rib was definitely fractured. I understood that it was, but I believe that it was not.

Q. Did you sustain a severe tear and twisting and wrenching of the tendons, muscles, ligaments of

(Testimony of Dorothy S. Walker.)

your back? A. Yes, I did.

Q. Did you sustain injuries to nerves, muscles, organs, and soft tissues of your upper chest and aggravation of a previous lung condition resulting from tuberculosis?

A. No, I have just stated that I thought that my chest was hurt badly. As it turned out, it was not.

Q. These photographs, if I may see them, please, Mr. Bailiff.

(Photographs presented.)

Q. I am handing you the top photograph, Mrs. Walker, which is No. 1-B, and I will ask you if it is not a fact that your automobile left the highway just in the vicinity of the area shown in this sign, "Highway 99E"? [21] A. Yes.

Q. That shows where you went off the highway?

A. Yes.

Q. Did you attempt to drive onto the shoulder and keep your car on the shoulder of the highway in view of the oncoming vehicles?

A. This happened so quickly by the time I realized that it was a truck I couldn't say whether I stopped to think that there was room to get off on the shoulder or not. I know that I was on the shoulder until I see this signpost in my headlights and went over the bank. I didn't realize how large a sign it was or how small.

Q. Very well. Now, Mrs. Walker, when you stopped you say that you regained consciousness,

(Testimony of Dorothy S. Walker.)

and there was a freight truck up on the road. Was that a silver truck?

A. Oh, I don't know, I didn't see that truck.

Q. How did you know it was a truck?

A. I mean, it was down, I couldn't see it. I could see the lights. He had driven on down, pulled out on——

Q. Do you know if that was a L.A.-Seattle truck?

A. Oh, I don't know.

Q. Do you know whether or not it was the same truck that crowded you off the highway?

A. If it was, it took him a long time to get down there because it was two o'clock—I assumed that it was not.

Q. You do not know definitely though whether it was or not, do you? [22]

A. I never saw the truck after I went over the bank.

Q. And so, as far as you know then, Mrs. Walker, the truck that stopped down there and the driver that came back might have been the truck that forced you off the road?

A. It might have been, but I don't know why he would waited an hour.

Q. What were the weather conditions that night?

A. It had been raining on toward the Coast, but to my best recollection it was dry. There was mud down in the ditch where we went, but I think the main surface of the highway was reasonably dry.

(Testimony of Dorothy S. Walker.)

Q. Was it cloudy?

A. I believe so. It was not foggy. It may have been cloudy.

Q. Were your headlights on high or low beam as you approached the area where your car left the highway?

A. Well, they were on high until I saw the two sets of headlights. Then I dimmed them. I always do.

Q. Were your lights on high or low when you say you saw the words "West Coast" on the truck?

A. To the best of my recollection, I flicked my headlights two or three times, thinking that perhaps whoever it was that was approaching was not aware that we were there. Now, exactly when we went over the bank I couldn't say. I assume they were on low.

Q. When you saw the words "West Coast" on the truck, as [23] you say, were your lights on high or low; would you know? A. I don't know.

Q. Would you know what a truck and trailer looks like? Do you know a semi?

A. Is that a semi truck trailer or tractor and trailer?

Q. Tractor and trailer. A. Yes, sir, I do.

Q. You have been in the truck business?

A. Not freight trucks, no.

Q. Log trucks? A. Yes.

Q. You know what a tractor is? A. Yes.

Q. You know what a semi trailer is?

(Testimony of Dorothy S. Walker.)

A. Yes.

Q. All right, now, was this a full truck; was it a tractor and trailer; was it a tractor and two trailers, or a set of doubles?

A. Oh, I don't know.

Q. Or a main box——?

A. I don't know because I did not see that. I did not have time enough. I saw it was a red truck with a silver van. Now, whether the van was stationary to the cab or whether it was on with a fifth wheel, well——

Q. Well now, the words "West Coast" whereabouts were they on the truck or tractor or main body or wherever it was that [24] you say you saw it? A. Up on the top of the silver van.

Q. That would be above the cab?

A. That is right.

Q. About how far above the ground would that be, Mrs. Walker?

A. Well, as I say, I am not familiar with freight trucks, so whatever their height is——

Q. Well, if I told you that the trucks generally are about 12 feet high, would that give you some idea how high this lettering was from the ground?

A. Yes, I am only estimating, you understand?

Q. Yes.

A. I would say it was probably some 6 inches to a foot below the top of the cab. That would be my estimation.

Q. You mean not cab but top of the truck?

(Testimony of Dorothy S. Walker.)

A. I mean top of the trailer, yes.

Q. Was that eliminated?

A. There was no lights on it. There were no lights, but the headlights on the truck were eliminated by my headlights, yes.

Q. Were the lights of this truck on bright or dim?

A. Well, I don't know. I believe that they were on dim. I am not sure.

Q. How fast was this oncoming truck going?

A. I could only estimate.

Q. Tell us your best estimate. [25]

A. I couldn't say for sure. I would say it seemed at that time forty-five to fifty miles an hour, probably fifty anyway.

Q. Your husband works for Consolidated Freightways; does he not?

A. That is right.

Q. When did he start working for Consolidated?

A. In the fall of 1952.

Q. Do you recall your deposition in this case, Mrs. Walker?

The Court: Give it to her.

(Deposition presented to the witness.)

The Witness: Yes, I recall that.

Q. (By Mr. Gearin): At that time you advised Mr. Young, my partner, that your husband did not work for a truck line in Oregon?

A. Well, I was not married to him at that time. He had never worked for a truck line when we were married before, in Oregon.

(Testimony of Dorothy S. Walker.)

Q. You received a settlement from your accident involving Jake's Crawfish?

A. Yes, a small settlement.

Q. Could you tell us how much that was?

A. I don't know how much the amount was because the doctor's fees, those were taken out of it. I think I received—I am guessing, I don't have the check—three hundred some dollars. [26]

Q. You do not know how much Mr. Peterson got?

A. I do not know how much the doctor's bills were now.

Q. Was there a center line on that highway at that time; do you recall?

A. We are speaking of 99E at Jefferson Junction?

Q. Well now, Mrs. Walker, you say that you have estimated the speed of this oncoming truck between forty-five to fifty. That was your estimate?

A. That is right.

Q. Would you turn to page 20 of your deposition, please. Refer, if you will please, to the fourth answer from the top.

A. Yes.

Q. And the next question you answered.

A. Yes.

Q. Do you see that?

A. Yes.

Q. When was it that you were first able to estimate the speed of the approaching truck?

A. Well, I don't know when. I would estimate it. I am estimating it simply by the amount of time

(Testimony of Dorothy S. Walker.)

it took us to come together. I didn't see how fast the truck was driving, and I felt I could only estimate——

Q. The reason I asked you that is because on August 7th when your deposition was taken you will agree with me, will you not, that at that time you could not estimate the speed of the truck? [27]

The Court: Read the question.

Mr. Gearin: "Q. Were you able to make any estimate of the speed of the approaching truck?

"A. No, I am afraid I couldn't do that."

The Witness: I told you now that I really couldn't. You asked me to estimate it. I did.

Q. All right, do you make a distinction between the word "estimate" and the word "guess," Mrs. Walker? A. Well, maybe I am guessing.

Q. Could you tell us about how far this truck was when you first noticed it being on the wrong side of the road?

A. I would again estimate and say about 500 feet.

Q. This truck that you saw down the roadway afterwards, did that have any clearance lights on it?

A. The only thing that I recall, when they were putting me on the stretcher I saw what I assumed was a freight truck covered with yellow lights parked down beyond where he had pulled out, and the man who first, to my recollection, first arrived told us that he was a truck driver; that he had seen

(Testimony of Dorothy S. Walker.)

our lights from his truck. He is the first person I remember being there.

Q. You have no recollection of going down the bank yourself, do you?

A. Yes, I recall going over the bank. I don't recall, I don't know whether, recall lighting or not. I think not.

Q. Do you know what kind of vehicle was being passed? [28]

A. No, I would not know for sure. I assume it was another car, but I wouldn't know.

Q. Do you know who was driving that car?

A. No, sir, I do not.

Q. Have you been informed as to the name of that individual?

A. I had been informed as to the name of an individual who was said to have been driving it. As it turned out, he was not driving it.

Q. What was the name of that individual?

Mr. Peterson: Objected to as immaterial, your Honor.

The Court: What do you claim for that?

Mr. Gearin: We have been trying to find out, your Honor. At the time the plaintiff's deposition was taken we asked the same question, and Mr. Peterson instructed his client not to give us that name. I have been trying to find out who it is. I would still like to know. I would like to make an independent investigation.

Mr. Peterson: Your Honor, I supplied counsel

(Testimony of Dorothy S. Walker.)

with the name of the person who stopped a car when it was going past, but that was another name.

The Court: The witness should have answered the question at the time it was propounded to her. Answer the question now.

The Witness: Yes, I was told that a Mr. Robinson was driving the car. After I talked to Mr. Robinson I realized he had not been—he had been mistaken. [29]

Q. (By Mr. Gearin): Did your car turn over as it went down the embankment?

A. I don't think so.

Q. You do not know, do you, Mrs. Walker?

A. No, I really don't know. I don't think so.

Q. You have never seen the car since?

A. I have not.

Q. You do not know of anyone who saw the accident or witnessed it other than yourself and Mrs. Renfro?

A. And the driver of the truck, I assume he must have seen it.

Q. You were an out-patient at the time of this accident; were you not?

A. I was and still am receiving what they call pneumothorax treatments which require me to get up on the hill once every ten days for air refills.

Q. You were undertaking that treatment at the time of this accident? A. Yes, sir.

Mr. Gearin: I have nothing further, your Honor.

(Testimony of Dorothy S. Walker.)

Redirect Examination

By Mr. Peterson:

Q. Mrs. Walker, I hand you what has been marked here as Plaintiff's Exhibit No. 1-D. I will ask you if there appears in that photograph a highway marker sign? A. Yes.

Q. I wonder if you would hold that up so that the members of the jury might see what you are referring to, and does that [30] appear in there as a white post? A. Yes.

Q. Would you tell the jury as you look in that photograph which direction are you facing?

A. This way you are facing south (indicating).

Q. You would be facing the same direction that you were then approaching?

A. No, I was driving north. I was coming this way (indicating).

Q. That is the person, when that picture was taken the camera would be faced——?

A. This would be north; this would be south (indicating).

Q. Where in relation to this post here did you drive your car off the highway?

A. Almost directly in front of it, 10 feet maybe.

Q. There appears to be some tracks on the photograph. Can you testify as to whether or not that is the position of your—or the location of where you drove the car off the highway?

(Testimony of Dorothy S. Walker.)

A. I know I went off directly in front of the signpost.

Mr. Peterson: May I hand this to the jury, your Honor.

The Court: Are you finished with this witness?

Mr. Peterson: No, I am not at the moment.

The Court: Wait until you finish.

Mr. Peterson: Very well.

The Court: Proceed. [31]

Q. (By Mr. Peterson): Mrs. Walker, handing you what has been marked as 1-B, which direction is that facing?

A. This is facing north. This would be north, and this would be south (indicating).

Mr. Peterson: In order that we might have something that the jury could see, would you have any objection if I would ask Mrs. Walker to make a mark on the photograph as to the position where the car was driven off from the highway?

Mr. Gearin: No.

Q. (By Mr. Peterson): I am handing you a lead pencil. Would you mark on the photograph, if you are able to, the position where you drove off from the highway.

A. It is not marked well, but I will try. (Witness marks on photograph.)

Q. Counsel, I cannot very readily see this. Why don't you take a pen.

The Court: Do that during the noon hour. She may mark it. Go ahead with your examination.

(Testimony of Dorothy S. Walker.)

Q. (By Mr. Peterson): Mrs. Walker, have you had a child since May 3, 1953?

A. Yes, I have.

Q. Did you have any difficulty during the pregnancy——

Mr. Gearin: Objection.

The Court: Objection sustained.

Q. (By Mr. Peterson): Mrs. Walker, in respect to the lettering which you saw on this truck, can you describe to [32] the jury whether that is black lettering, or can you describe it for us?

A. I don't know, but as I saw it that night in my headlights it was writing in a bar effect right across the top of the truck—or of the trailer, and the lettering was in red, and the trailer was silver. It said "West Coast." All I saw was the two words. If there were more than that I didn't see them. I don't think that there were any more because I saw it plainly. I think it just said "West Coast."

Mr. Peterson: No further questions.

Mr. Gearin: Nothing further.

(Witness excused.) [33]

EMILY RENFRO BATTEN

a witness called in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Your name is Mrs. Emily Batten?

A. Yes.

Q. Mrs. Batten, what is your husband's name?

A. George Batten.

Q. What is his occupation?

A. An accountant.

Q. Mrs. Batten, what was your name prior to your marriage and present married name?

A. Emily Renfro.

Q. Mrs. Batten, do you know Dorothy Walker who sits on my right here? A. Yes, I do.

Q. When did you first become acquainted with her?

Mr. Gearin: This is immaterial, your Honor.

The Court: She may answer.

The Witness: In December, 1951, I think it was.

Q. Did you continue your acquaintanceship after December, 1951? A. Yes, we did.

Q. Did you see Dorothy Walker in the latter part of April, or first part of May, 1953? [34]

A. Yes.

Q. When were you discharged, if you were, from any institution for the treatment of tuberculosis?

(Testimony of Emily Renfro Batten.)

A. Well, of course, it was quite dark. There were no lights or anything around, and I was on the ground, and how far down I don't have any idea.

Q. How long did you remain there?

A. Well, I couldn't say in time. When I first was aware of anything there was no noise or anything like that. Then on occasion I could hear Dorothy calling to me, and she was crying, and then one time she called quite loudly asking where I was and wanted to know if I was all right, and I said well, I thought that my——

Mr. Gearin: We object to conversations of Mrs. Batten.

The Court: Objection sustained.

Mr. Peterson: Will the Court permit showing expressions of pain?

The Court: Where?

Mr. Peterson: At the scene of the accident.

Mr. Gearin: We have no objection to that, your Honor.

The Court: Proceed.

Q. (By Mr. Peterson): Did Mrs. Walker, while you were lying there on the bank, make any expressions of pain or exclamations of pain?

A. Yes, she did.

Q. What were those exclamations or expressions of pain?

A. Well, she was doing a good deal of crying and moaning [37] and kept telling me to lie still and that she would try to get help for us.

(Testimony of Emily Renfro Batten.)

Q. Do you know how long you remained where you were?

A. No, I couldn't say. It seemed, of course, it seemed an awfully long time to me, but then I didn't have any idea.

Q. Did you see Mrs. Walker get out of the car?

A. No.

Q. Or did you hear any sound other than those that you have related as to voice?

A. No, other than I think perhaps I might have heard sounds of traffic above some place, but I didn't—nothing close to me.

Q. Do you know of your own knowledge what time it was when you were taken out of where you were?

A. No, the only next recollection of time I have is when they told us in the hospital that it was two-thirty or thereabouts.

Q. Did you have any conversation with any deputy sheriff from Marion County, Oregon, who identified himself as such?

A. No one ever identified themselves to me as being a sheriff or police officer of any kind at the scene of the accident.

Q. Did you have any period of unconsciousness after leaving the scene of the accident?

A. After leaving the scene of the accident?

Q. Yes. [38] A. No.

Q. Do you know of your own knowledge whether Dorothy Walker did?

(Testimony of Emily Renfro Batten.)

A. I never saw Dorothy until we were in the hospital waiting to be X-rayed, and then I didn't see her to talk to. I mean, she was in the same room with me or whatever it was——

Q. Do you know whether or not you came in the same ambulance to the Albany General Hospital?

A. I really don't know. I really couldn't say.

Q. Mrs. Renfro, how long did you stay in the Albany General Hospital?

A. We were removed at the same time.

Q. You were removed in the same ambulance?

A. Yes.

Q. You were taken to Matson Memorial Hospital? A. Yes.

Q. During the time that you were in the hospital at Albany General Hospital were you constantly in the presence of Dorothy Walker?

A. Yes.

Q. About what time of the day did you leave the Albany General Hospital?

A. Well, I believe it was sometime before noon, but I wouldn't swear to it. I couldn't say for sure the exact time of when we were removed.

Q. Did you stay in the Matson Memorial Hospital a longer period [39] of time than Dorothy Walker did?

A. Yes, I was there when they took her out.

Q. Then the next time you saw her was when?

A. It was quite some time later I went up to Good Samaritan, and I saw her.

Q. Mrs. Batten, have you seen her on several

(Testimony of Emily Renfro Batten.)

occasions since that time? A. Yes.

Q. Has she made any expressions of pain or discomfort to you. A. Yes, she has.

Q. What have those been?

A. Well, she has complained a number of times about her hip.

Q. Have you observed any change in her physical appearance between prior to this accident and since? A. Yes, I think she looks worse.

The Court: I cannot hear you.

The Witness: Yes, I think she—you mean over-all physical appearance like such as loss of weight and so forth and so on?

Mr. Peterson: Yes.

A. I believe she has lost considerable weight. At least, she appears to to me.

Q. Do you notice any change or difference in her walk or gait? A. Yes, I believe I do, yes.

Q. What is that difference? [40]

A. Well, there are times when she has quite a bit of pain in her hip and does quite a bit of limping.

Q. At any time in your presence has she fainted? A. Fainted?

Q. Yes.

A. Yes, I believe she has a couple of times.

Mr. Peterson: You may take the witness.

(Testimony of Emily Renfro Batten.)

Cross-Examination

By Mr. Gearin:

Q. I will ask you, Mrs. Batten, if at the scene of the accident you were asked this question and you made this response to Mr. Duane William Lehr: "What happened?"

Mr. Peterson: May I inquire as to whether or not there were any other persons present?

Mr. Gearin: There being present Mr. Lehr and yourself, and you were asked this question: "What happened?" You replied, "I don't know, it happened so fast." Did you tell Mr. Lehr that?

A. I don't recall anyone, I don't recall people asked me things like people will do when there has been an accident and some people around, and I did a little talking, I was so frightened, and I was having a good deal of pain in my back. I was also crying so that I am sure that I never answered anybody.

Q. Your testimony is that you did not make such a statement? A. That is right.

Q. You were not paying too much attention to the manner in [41] which Mrs. Walker was driving her automobile?

A. Well, I know that Mrs. Walker was driving in a very safe manner and not too fast.

The Court: You just answer the questions. When he asks you a question you answer it.

The Witness: Would you repeat the question, please?

(Testimony of Emily Renfro Batten.)

Q. (By Mr. Gearin): You stated that you were not paying attention. To what were you not paying attention, Mrs. Batten?

A. I was not paying attention to the surrounding area.

Q. Where was this truck that you saw when you first saw it?

A. When I first realized that it was a truck?

Q. That is right.

A. It was immediately before we went over this bank.

Q. In what lane, where was Mrs. Walker's car with reference to the center line of the highway at that time, if you know?

A. Oh, considerably over to the right of the line.

Q. How far was it from the right-hand edge of the pavement?

A. I am afraid I wouldn't know. I wouldn't be able to say.

Q. How fast was Mrs. Walker going?

A. At that particular time?

Q. Yes.

A. Probably going thirty-five miles on up to forty-five. She never drove over forty-five or fifty.

Q. How fast was the truck coming?

A. I don't know; I couldn't say.

Q. You were turning the radio on for music; were you not? [42]

A. Yes, and for time.

(Testimony of Emily Renfro Batten.)

Q. And as a matter of fact, all you saw was four lights across there?

A. Yes, well, yes, two pair of headlights.

Mr. Gearin: That is all.

Redirect Examination

By Mr. Peterson:

Q. Do you recognize anyone in this courtroom whose name has ever been referred to you as Duane Lehr? A. No.

Q. Did you ever hear the name, Duane Lehr before? A. No, not until it was asked.

Q. Do you recognize anyone in this courtroom who spoke to you on the morning of May 3rd, 1953, at the scene of the accident you have described?

A. No, not that are familiar.

Q. Did anyone identify themselves in any capacity either as a police officer or a law enforcement officer?

A. No, no one said to me that they were a law officer.

Q. When you arrived at the Albany General Hospital were you able to walk? A. No.

Q. Without going into any detail as to the nature of your injuries, were you in any pain or distress of a serious [45] nature while you were in the Albany General Hospital?

A. Yes, in my opinion, I was.

Q. Or at the scene of the accident after it occurred? A. Pardon?

(Testimony of Emily Renfro Batten.)

Q. Were you in any pain or discomfort or distress after the accident occurred and at the scene of the accident? A. Yes.

Mr. Peterson: No further questions.

Recross-Examination

By Mr. Gearin:

Q. Mrs. Batten, you were present at the scene of the accident when Mrs. Walker talked to the state police; were you not?

A. An officer talked to Mrs. Walker when we were in the hospital that I recall.

Q. Do you recall when your deposition was taken in this case, which is referred to as pre-trial Exhibit No. 1?

Page 13. I will ask you if at the time your deposition was taken in my office on February 9, 1954, there being present Mr. Peterson, Mrs. Walker, the plaintiff and Eleanor Pidgeon the court reporter, you were asked these questions and you gave these answers:

“Q. Miss Renfro, were you present at the scene of the accident when Mrs. Walker talked to the state police?

“A. I had to be present. I don't know [46] where she was when they arrived.

“Q. I mean, did you hear her talking to the state police officer? A. Oh, yes.

“Q. Did you hear her tell the state police what happened? A. Yes.”

(Testimony of Emily Renfro Batten.)

You so testified last year, didn't you?

A. This was at the hospital.

Q. I will ask you if at the same time that your deposition was taken you answered the question, you answered this question as follows:

"Q. And did she tell the state police the same thing at the hospital later on that morning?

"A. Yes, she did."

Did you so testify as appears in that deposition?

A. Well, apparently I did. It is in the deposition.

Mr. Gearin: I have nothing further, your Honor.

Redirect Examination

By Mr. Peterson:

Q. Mrs. Batten, what conversation did you hear between the police officer and Dorothy Walker?

Mr. Gearin: Objection. [47]

The Court: Objection overruled.

The Witness: You mean I can answer?

Mr. Peterson: Yes, you may answer.

The Witness: This, to me, was in the hospital. I mean, to my knowledge it was in the hospital and the police officer was talking to Mrs. Walker and asking her about the accident and asking her what it was and so forth and so on, and she said, "It was a truck, and if you hurry you can run it down." He asked her if she knew what kind of truck it was, and she said, "Yes," she said, "it was

(Testimony of Emily Renfro Batten.)

a West Coast truck, and it had no lights on it other than the headlights." And so they talked a little while. I don't recall any more of the conversation. Then he stepped back away from her. They were off to my right some place, and I saw him off to the foot of me, and he said to some other people, "I don't believe there was any truck involved at all, and I am not going to run it down," and that was the last I heard of that particular conversation.

Q. Do you recognize the person as being in the courtroom at the present time?

A. I couldn't identify anyone, I mean, other than that they were men.

Q. Were you then lying on a stretcher?

A. Yes, I was.

Q. Was Dorothy Walker also lying on a stretcher? [48]

A. Yes, she was.

Q. This conversation occurred—how far apart was your stretcher from hers?

A. Well, possibly the distance between this man and myself (indicating).

Q. Was this in a hospital room at the Albany General Hospital?

A. Well, it appeared to be like when you come off the elevator before you go—we were waiting for X-rays.

Q. Was there anyone else present at that time?

A. There seemed to be three or four people present.

Q. Do you know who they were?

(Testimony of Emily Renfro Batten.)

A. No, I do not.

Mr. Peterson: No further questions.

Recross-Examination

By Mr. Gearin:

Q. Do you recall definitely that Mrs. Walker told the state police officer in the hospital that it was a West Coast truck? A. Yes, she did.

Q. You recall that definitely?

A. Yes, she did.

Q. There is no question in your mind about that at all? A. I heard her say it.

Mr. Gearin: Thank you, that is all.

Mr. Peterson: That is all.

(Witness excused.) [49]

The Court: Ladies and gentlemen of the jury, as I have told you on previous occasions, please do not make up your minds as to how this case should be decided until you have heard all the testimony, the arguments of counsel, and the instructions of the Court. Prior to the time the case is submitted, under your oath, you are not to discuss this matter with anyone else, even among yourselves.

There are some witnesses for both sides in this courtroom. Please do not talk to anyone or any of them about anything, even matters not connected with this case. The jury is now excused until two o'clock this afternoon.

(Noon recess taken.) [50]

Afternoon Session, 2:00 P.M., Trial Resumed

Series of photographs marked Defendant's Exhibits 26A, B, C, D, and E for identification.

(Deposition of Dorothy Walker marked Defendant's Exhibit 24 for identification.)

JOHN F. ABELE

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

The Court: Are you an orthopedic surgeon, doctor?

The Witness: I am, sir.

The Court: Is there any question about this man's qualifications?

Mr. Gearin: No, your Honor.

The Court: The qualifications of Dr. Abele are admitted. It is stipulated that he is duly licensed to practice medicine in the State of Oregon; that he confines all his activities to the specialty of orthopedic surgery. Tell us what the field of orthopedic surgery is?

The Witness: The field of orthopedic surgery is that branch of medicine related to bone and joint structures and their allied structures such as tendons and muscles that cause the joints to function, or diseases, injuries.

The Court: Proceed [51]

(Testimony of John F. Abele.)

A. The findings did you wish, what did the findings consist of?

Q. What did your examination consist of?

A. Consist of?

Q. Yes.

A. Inspection and movement of the affected limbs that were painful to determine what the extent——

Q. Doctor, did the patient give you a history of injury? A. She did.

Q. What was that history?

A. The history was she the previous day was driving a car with a passenger and was driven off the road and overturned. I am not sure whether it was overturned or not. Anyway, there was a severe enough accident that she was jolted and thrown about in the car and knocked unconscious, momentarily dazed, and sufficient injuries to be taken to the hospital in the neighboring town of Albany. Because of her being a previous out-patient of Matson Memorial Tuberculous Hospital she was transferred to that institution.

From my examination briefly there with the X-rays that I saw, I felt that she was not in the proper institution for her best care of her injuries per se and it would be better to transfer her to a general hospital, which we did, took her to Good Samaritan Hospital and there were able to get more accurate X-ray studies as most of the X-rays that are done at the Matson Memorial are just films. Dr. Tuhy [54] consented to observe her as

(Testimony of John F. Abele.)

a patient in Good Samaritan Hospital rather than in the Matson Memorial as it was felt that at the moment the injuries of the extremities and body and spine were of more importance than the chest, and at least determine how bad they were.

Q. Doctor, what was your diagnosis of injury at that time?

A. Sprains of the neck and the low back and fractures undetermined until better X-rays could be made.

Q. Fractures?

A. Fractures undetermined until better films could be obtained.

Q. Doctor, then did you order her removed from the hospital to another hospital? What hospital did you transfer her to?

A. We took her to Good Samaritan Hospital in Portland.

Q. Then, doctor, did she continue under your care at the Good Samaritan in Portland?

A. She did.

Q. What did your treatment consist of after that time?

A. What did the diagnosis consist of, did you say?

Q. No, first your treatment.

A. The treatment consisted of bed rest, observation of the problems, whether or not they were getting worse, whether there was just muscle spasm or—X-ray studies were taken and ruled out the

(Testimony of John F. Abele.)

questions of fractures or broken bones. No fractures were determined. She was treated with—I believe she had head traction. She was placed in traction on the head and traction on the leg. Traction means a steady [55] pull by a weight over a pulley on a rope attached to the limb or, in this instance, also the head, in order to allay, quiet down the muscle spasm and relieve her of her pain while nature permits healing to occur in the sprained ligaments.

Q. Doctor, what was your diagnosis?

A. The diagnosis after she had been more thoroughly studied consisted of sprain, rather severe, of the neck and of the low back and a problem which we called coccydynia which means painful coccyx or tail bone which developed, oh, we first recognized the complaint from here about five or six days of observation. The other problems were to my mind more important to her, and as they subsided, why she started to complain about her tail bone hurting her, and the treatment of that consisted of conservative management with heat and sitz baths. That is merely a German word for sitting, to sit in a hot bath of water, which again allays the pain by quieting down the muscle spasm. The remainder of the treatment was supportive garment and teaching her the mechanics of avoiding strains of the neck and of the low back and of the tail bone. The treatment there is more or less to try to keep the weight off the tail bone without sitting on it, but they most of the time have found out what to do, sit on one buttock or the other. They

(Testimony of John F. Abele.)

refuse to sit directly on the tail bone. I think on my diagnosis there were some minor things such as contusions, which is bruises of the hip [56] from having been struck against some object. That was the right hip.

Q. Doctor, how long did she remain in the hospital?

A. Mrs. Walker remained in the hospital from May 4th to May 21st. When she left there was a question on her part of financing her care——

Mr. Gearin: We ask that that be stricken and the jury be instructed to disregard it.

The Court: Very well.

The Witness: This had something to do with my discharging her.

The Court: Very well, go ahead.

The Witness: She felt she could carry on as well at that state at home, and I agreed that she could if we observed her, and she was then sent home on that date which was the 20th, less than about, I guess, eighteen days of hospitalization.

The Court: Doctor, did the X-rays show any abnormality of her bones?

The Witness: They did. There was a congenital anomaly, but that was all.

The Court: That was something she had long before the accident?

The Witness: Yes, sir.

The Court: Are there any deformities or any fractures shown by the X-rays which resulted from the accident?

(Testimony of John F. Abele.)

The Witness: No fracture, that is, disturbance of a [57] bone alignment within each bone. There is a disturbance in alignment of the tail bone.

The Court: Show that one.

The Witness: The tail bone is the segment or small set of bones that is a continuation of the sacrum. That is part of the spine in the anterior pelvis girdle or basin, and the sacrum wedge has a curve, a swing forward just like the curve of the buttock, and the tail bone tucks under just like a dog tucks its tail between its legs, well, the tail bone has a normal sweep forward.

The Court: Where were those X-rays taken that you wanted, at the Good Samaritan or at Matson?

The Witness: I imagine they are Good Samaritan X-rays.

The Court: That is No. 5.

The Witness: Any film of the pelvis would show it.

Mr. Peterson: Your Honor, Exhibit 5 consists of a variety of X-rays but none taken after May 3, 1953, and I showed them to counsel, and I thought that they were here. I thought they were in that envelope here.

The Court: In other words, you do not have the X-rays that were taken by Dr. Abele or under his direction. Do you have any X-rays of your own?

The Witness: There may be some at the office. Any X-ray of the pelvis will show.

The Court: Do you have an X-ray of the [58] pelvis?

(Testimony of John F. Abele.)

Mr. Peterson: Yes, I have, your Honor, a number taken at the Tuberculosis Hospital, your Honor.

The Witness: Those, as I recall, were not too good films as they are taken and used to take care of the chest.

The Court: Look at the ones presented by Mr. Gearin. What numbers are those?

The Witness: There is only one film here, sir, that could be shown that has any value, and this is a front to back view and is not a lateral.

The Court: What is the number?

Mr. Gearin: 5, your Honor, they are in the big folder, Defendant's Exhibit 25. I can find them if I approach the bench, your Honor.

The Court: Very well.

Mr. Gearin: Here they are, your Honor. (Presenting X-rays from Defendant's Exhibit 25.)

The Witness: This is an A/P. This is a picture of the body at the pelvis or hip level. Here is the lower part of the spine which is the small of the back, the pelvis, the thigh bones, the hip joint, the sockets. Now, in the center of the pelvis basin or circle is a wedge-shaped bone which is called the sacrum, and that is part of the spine bones, but they have grown together in all people. There are five segments, and the first one is wide, and they narrow down until you get to the bottom, and then there are three [59] small segments that make a little tail, and, normally, the wedge comes straight down. This picture is a little bit—the pelvis is turned, you see, one side is more prominent than

(Testimony of John F. Abele.)

the other. An X-ray is a paper thickness of the width of the body so everything is supervised or piled on top of themselves so we have to look more or less through this.

The spine more or less drops down directly back from the center of the neck and down to the tail and between the legs. If you dropped a plumb line you could see here that the tail swings off to the patient's side. I do not remember whether it is the left or the right. It is to the right if this marker is on the right, but that is inconsequential. Anyway, it is off to the side.

Q. (By Mr. Peterson): Doctor, where is this congenital anomaly?

A. The congenital anomaly is here at the top of the sacrum where it meets the low back. Normally, the tips of the spines that you feel on your back when you run your hand down it form an arch that comes up, and underneath the arch the spinal cord runs between each vertebral bone. Now, the arch is incomplete on the tip of the sacrum bone. The significance of that is debatable. We feel it is an architecturally weak structure, but many times we find it in people who have no complaints.

Q. (By Mr. Peterson): Where is the [60] coccyx?

A. Here is the sacrum. The very tip of the sacrum are the three little bones of the coccyx, right here (indicating). They are a movable structure. You cannot take the sacrum and move it up and down, but with one finger in the rectum and one

(Testimony of John F. Abele.)

finger on the skin you can move the tail bone, and it should be painless, and when you sit on it it moves a little, normally. I have another view here.

Q. If you have another view, let me ask about this.

A. Ordinarily, in taking X-ray studies we take two projections so that we can visualize this body because everything, as I said, is all piled down to the one paper thickness, and you cannot really tell a structure.

The small of the back curves forward. We sway; all of us do, some of us more than others. Then the sacrum, the wedge that we saw swings backwards, takes a curve just like the curve up the buttocks. Then the sweep on forward, the tail bone, the sweep forward, and in Mrs. Walker's instance the tail bone is very prominent. When you feel down there it bumps right into your fingers as soon as you approach it; whereas, normally, it should swing forward, and when you put your finger into the rectum coming over this way you have to curve it over to get in front of it. In her instance it is quite straight.

Q. Doctor, do you have an opinion as to whether or not this displacement or abnormality so far as the coccyx is [61] concerned is due to trauma or injury?

A. It is an assumption mainly to the fact that it does not exist as a normal pattern at all as all of them sweep forward. She had no story of trouble there before. She had an accident. She started complaining of this area within two or three days of the

(Testimony of John F. Abele.)

time of her injuries, and she has persisted in complaint of that since.

Q. Doctor, in respect to the coccyx, do you have an opinion as to whether or not she will be required to undertake further surgery?

Mr. Gearin: You mean she has had some surgery?

Mr. Peterson: Strike "surgery." Pardon me.

The Witness: I think that she could be helped with surgery. This is a problem that we postponed surgery hoping that conservative management will make her satisfied and not have complaints regarding it. However, it has been since May, 1953. She has gone through 1954 and started into 1955, and she still has discomfort on sitting directly on her buttocks for any length of time. She has got to keep shifting. The use of sitz baths will give her some relief, but she does not gain complete, total relief. She has a permanent disability. Why do we not do surgery earlier? Surgery in this instance merely is the removal of that segment of bone and takes out the painful joint. There is no longer any joint. However, somewhere between 30 and 40 per cent in average after the surgery continue [62] to have some discomfort in the scar, but around 60 to 70 per cent are completely relieved of their symptoms. Now, if you can overcome that with conservative management, you save the patient time loss, discomfort of surgery, and hazards that go with surgery. That is, you cannot guarantee that you are going to give them a perfect result. I do not advise

(Testimony of John F. Abele.)

going ahead with surgery immediately, but she has had what is considered a fair trial of conservative management, and she has not improved.

Q. Doctor, on such surgical procedure would that require hospitalization?

A. It would require hospitalization.

Q. How long would she have to be in the hospital?

A. Two to three weeks.

Q. Would she be required to wear any support or anything following that?

A. I would not expect so. For the coccyx you are speaking of?

Q. Yes, for the coccyx. Doctor, in relation to other injuries of her low back, do I understand you correctly to say that she had a lumbosacral sprain?

A. Yes.

Mr. Gearin: He did not say that. He said low back sprain.

Mr. Peterson: I will withdraw the question.

Q. Am I correct in understanding you to say that she had [63] a low back strain?

A. Yes, I did say low back strain?

Mr. Gearin: Yes.

The Witness: I do.

The Court: Start over again. What did you say, Doctor?

The Witness: May I ask the recorder to repeat? I do not recall whether I said lumbosacral strain or low back strain. They are in the same area.

The Court: What did she have?

The Witness: She had lumbosacral sprain.

(Testimony of John F. Abele.)

The Court: Proceed.

Q. (By Mr. Peterson): Doctor, have you an opinion as to whether she will require further treatment for that condition?

A. A lumbrosacral sprain has also persisted under the ordinary activities of her living in the last year plus, and I think that she should be treated conservatively with a support to support the strained areas that seem to be chronically irritated. If when she tries to relieve herself of the garment her symptoms keep recurring, then I think it would be advisable to do surgery there in putting in bone grafts to support the weakened joint. In the majority of these people, I would say maybe that would occur in only 10 per cent of them; however, if you are trying to make a decision of what her needs are, you would have to consider that as a strong probability, that surgery might be indicated. [64]

Mr. Gearin: I ask that that be stricken, your Honor, based upon the doctor's statement that it might be indicated.

The Court: The objection is denied.

Mr. Gearin: Very well.

The Court: It does not mean that that might be sufficient evidence to go to a jury.

Mr. Gearin: I understand, your Honor.

Mr. Peterson: Could I ask the doctor a question pertaining to that?

The Court: Proceed.

Q. (By Mr. Peterson): Doctor, is it reasonably probable that Mrs. Walker will be required to un-

(Testimony of John F. Abele.)

dergo a further surgery on the low back which you have described in relation to the lumbosacral strain?

A. It is.

Q. What is the nature of the surgery that she will be—it is reasonably probable she will be required to undergo in respect to that?

A. The surgery would consist of obtaining bone struts to strengthen the internal architecture of the spine, that is, the skeleton at the area that is constantly sore.

Q. How long would that require her to be in the hospital?

A. Circumstances vary. She would be required to be an absolute hospital patient for about three weeks. Then with a body cast, if the situation is right at home, she could be [65] at home. She would wear a cast somewhere close to two to three months, until X-rays show the union, cementing of these bone fragments that have been placed in there, these struts, has developed and she can go without her cast.

Q. Doctor, what is the probable cost of future hospitalization and surgery such as you have described?

A. May I ask, are you referring to both the coccyx and the——

Q. Both the coccyx and the fusion that you have just described.

A. A fusion operation, the surgeon's fee is figured around \$350, and the coccygectomy about \$150. I think the anesthetic fees would each, would

(Testimony of John F. Abele.)

run about \$20 each. They are not procedures you can do together. They have to be done separately. She would have two periods of at least three weeks each in bed at the hospital, and there would be a five- or ten-dollar laboratory fee each time. There would be additional X-rays and probably the X-rays would run, total before she was through of \$75.

Q. That is on each one?

A. No, that is the total of the two.

Q. Total of the two. What would be the reasonable cost of her hospital bill for these two surgical procedures?

A. Pardon me. In giving you those statements, the only professional costs would be a charge for the surgery. The other figures are for hospital charges except for their daily rate which runs around \$16, something like that, a [66] day. She would have two three-week periods that you would figure.

Q. Yes, she would have a total of six weeks at \$16 per day.

A. Then there would be a garment, and there would be a cast. A garment runs about \$20, and the cast probably about the same, \$30. Those are very loose figures.

Q. Doctor, do you have an opinion as to whether or not she has any permanent injury as the result of the accident as a result of the injuries for which you have treated her?

A. Yes, I do have an opinion.

Q. What is your opinion?

(Testimony of John F. Abele.)

A. She has a permanent partial disability involving her lower spine and her coccyx.

Q. Doctor, is the sum of \$25 a reasonable charge for an examination at the Albany General Hospital?

Mr. Gearin: If you have a bill, I will stipulate to it, Mr. Peterson.

The Court: Where is the bill?

Mr. Peterson: I do not have the bill. I had my secretary compile them all based upon either the doctor or the hospital.

Mr. Gearin: If you say what it is I do not have objection.

The Court: How much is the bill?

Mr. Peterson: The total I have is—— [67]

The Court: What have you got down there for Dr. Tuhy?

Mr. Peterson: \$137.

The Court: In other words, it is stipulated that if persons were called from the hospitals, or physicians, they would testify that these amounts to which Mr. Peterson has referred were all reasonable and that they were incurred as a result of the injuries which Mrs. Walker sustained on May 3rd. However, the defendants do not admit that they were responsible for any portion of it. As you know, they are denying that their truck was even in the vicinity at the time of the accident.

Q. (By Mr. Peterson): Doctor, insofar as the neck injury is concerned, did she recover from that?

A. I think she has.

Q. As I understand it then, the residual that she

(Testimony of John F. Abele.)

has is a low back sprain and an injury to the coccyx? A. Yes, sir.

Q. This coccyx injury, I understand, amounts to a misplacement or displacement of it?

A. For practical purposes, it amounts to displacement. At least that is apparent in the X-rays; however, many people have painful coccyges from an injury which show very little displacement.

Mr. Peterson: May I ask the doctor his own bill?

The Court: Is that not in there? [68]

Mr. Peterson: It is, your Honor, but I have not detailed it.

The Court: What was your bill?

The Witness: Our bill total is \$162 except the last visit on February 2nd of this year.

Q. (By Mr. Peterson): What is the reasonable cost of that?

A. Her bill on February 2nd, there is a total of \$30 there for new X-rays and examination.

Q. That is the last time that you have seen her?

A. Yes, I did not see her through, from August, 1953, until February, 1955.

Q. Doctor, do you have an opinion as to whether or not she will suffer pain in the future?

A. I believe that she will.

Q. Will she suffer pain for the rest of her natural life? A. I believe that she will.

Mr. Nelson: You may take the witness.

(Testimony of John F. Abele.)

Cross-Examination

By Mr. Gearin:

Q. Doctor, you say that probably she is going to have to have surgery on the low back?

A. I do.

Q. That is notwithstanding your testimony that perhaps only 10 per cent of people in her condition would require it? A. I do.

Q. And you say that you ought to try to support the back, [69] and if that does not work then perhaps you take a look and maybe then have surgery?

A. I do not remember saying anything about taking a look. You mean like in, as they undergo surgery?

Q. No, just take a look at the patient?

A. Oh, yes.

Q. That is right, and you do not say now that she needs surgery, do you?

A. You mean that she needs surgery now or do I now say that she needs surgery?

Q. Yes, she needs surgery now?

A. Today?

Q. Yes. A. No.

Q. You want to try a support before you send her to the hospital for surgery? A. Yes.

Q. You have not furnished her with support, have you?

A. I do not know whether I have in the past or

(Testimony of John F. Abele.)

not. I can see there she had supportive therapy, but for the year that I did not see here she lived quite a normal life, had a baby, but developed all of her symptoms to the point where she could not take it any more.

Q. She had a normal life in the period of time that you have not seen her?

A. She carried on an existence that we call a normal life, that is, having a family. Whether she did it without [70] symptoms, she had symptoms, or maybe it would not be so normal.

Q. Why haven't you prescribed a support for her before this?

A. You mean before this, you mean today?

Q. Yes, before you say that it is probable she will have to have surgery.

A. Well, the last that she came to my office was in August, 1953.

Q. Yes?

A. At that time—I cannot see here whether or not I did give her a support. (Consulting notes.) When I saw her in August, 1953, the problem was mainly related to her tender tail bone, and she was still complaining of a chronic lumbosacral complaint or problem which should have been fairly well resolved with the amount of her bed fast care. I saw her a few weeks later again in the office. She was much better in the right leg and hip but still troubled with the low back. She was having some trouble with her eyes. She was sent to Dr. Martin. Her coccyx remained sensitive. She had what she

(Testimony of John F. Abele.)

calls a slump, that they speak of as a pneumo slouch, people who are taking air injections in the chest.

Q. What they call pneumotherapy?

A. Please?

Q. That is pneumotherapy she was talking about?

A. Yes, and so instructions were given to her in body posture to try and eliminate the strains that were being incurred in her back. [71]

Q. May I interrupt you there, Doctor? Sometimes people who have problems with posture develop low back pain, do they not? A. Yes.

Q. Especially if they have a pre-existing condition such as you found here in this woman?

A. Yes.

Q. Such as spina bifida occulta? You pronounce it, not me.

A. Spina bifida means, bifida, two parts.

Q. That is right. She had that before this accident?

A. She was born with that. She had no complaints with it.

The Court: Are you all through?

The Witness: He is still trying to find out if I put a corset on her. I cannot find in my notes if I did.

Q. (By Mr. Gearin): Doctor, did she give you a history of a serious fall occurring a year before this automobile accident?

A. I do not recall that she did.

(Testimony of John F. Abele.)

Q. Assuming, Doctor, that on May 10, 1952, the plaintiff, Dorothy Walker, fell with great violence and sustained severe injuries to her back, would the condition that you have described here——

The Court: Of the back?

Mr. Gearin: Yes—be affected by a serious fall?

A. Yes, it would.

Q. And that would have an effect upon your diagnosis and [72] your prognosis?

A. I have a vague suspicion that she did mention something about having had an injury. I do not have it in my notes, but it seems to me that there was something—I couldn't really testify to that though.

Q. You said that she told you that she was not unconscious in this accident?

A. She was momentarily dazed.

Q. But she was not unconscious?

A. That is right.

Q. As far as this coccyx is concerned, if you prescribe a corset you have to crowd it into—indicating with my hands—that is what they all a lower buttocks support, anything treating, treatment with that type of support to alleviate——

A. I have not put a corset on her.

Q. This treatment is a treatment that is used quite frequently by orthopedists to alleviate pain in a coccyx; is it not?

A. Almost any type of support is used on these patients from two-way stretches all the way on up.

(Testimony of John F. Abele.)

They are not very satisfactory. They are uncomfortable, and the patients usually won't wear them.

Q. You took some X-rays——

A. If you put on something snug around there you squeeze the buttocks in, and most of the times they complain of that. [73]

Q. When you saw her this year that was not for treatment, was it, Doctor?

A. It was for examination, determination of her present condition.

Q. That is right, for the purpose of this trial?

A. Yes.

Q. You took some X-rays, did you?

A. Yes.

Q. You do not have them with you now?

A. No, I do not.

Q. Isn't it a matter of fact, Doctor, that even among the field of orthopedists that there is a difference of opinion as to the advisability of surgery to correct pain in the low coccyx or in the coccyx?

A. There is more uniformity about the coccyx than many other parts of the orthopedic field.

Q. May I see your notes, Doctor?

A. Surely.

(Presenting notes.)

Mr. Gearin: I have nothing further.

The Court: Do you have any further redirect?

Mr. Peterson: Your Honor, I would like to ask the doctor if he made any entries in Good Samari-

(Testimony of John F. Abele.)

tan Hospital records and ask that they be handed to him to refresh his recollection, if he did. [74]

Mr. Gearin: He has not testified, your Honor, that he needed to be refreshed.

The Court: What difference would that make?

Mr. Peterson: It has not been received in evidence. Counsel just advised me that he objects to the Good Samaritan Hospital records being received in evidence, but I just asked if he would have any objection to the doctor refreshing his recollection from them, and he said no, and I propose to ask the doctor if he has made entries there.

The Court: Is there any objection to the entries which the doctor made?

Mr. Gearin: That is one of the bases of the objection, your Honor. It contains statements made by the doctor to other doctors concerning which there would be no cross-examination, and especially as to the facts concerned with this witness. I have no objection to the hospital record as such. I do object to the doctor's comments of the opinion contained in the hospital record, and if the doctor needs to refresh his memory I have no objection to the use of this to refresh his memory, if his memory does need refreshing.

The Court: I have ruled earlier, and I thought you did not agree with me, Mr. Gearin, that I would not permit any hospital records or any portion of the hospital record which expressed an opinion of a doctor, nor would I permit any portion of a hospital record, except for purposes of [75] impeach-

(Testimony of John F. Abele.)

ment, concerning the manner in which the accident occurred. I also ruled that the letters of Mr. Kliks would not be admissible.

Mr. Gearin: Thank you.

The Court: I thought you took issue with me as to the statements and opinions of these doctors.

Mr. Gearin: I did not understand, your Honor, that you would let them in for the purpose of impeachment, and that is why I wanted them in the record in that I could use them subsequently for the purpose of impeachment.

The Court: I shall rule now that the hospital records are admissible, except those portions which contain the opinions of doctors or nurses, and, likewise, any letters from attorneys may not be admitted. I think you already stipulated to that.

Mr. Peterson: Yes.

The Court: What is it you want Dr. Abele to do?

Mr. Peterson: I want to have the opportunity of handing the hospital records of Good Samaritan Hospital to him and then ask him some questions so that he may refer to them to refresh his recollection as to the condition of the patient on admission.

The Court: Yes, that is perfectly all right. Do you know about her condition at the time she was admitted to the hospital?

The Witness: Yes.

The Court: Do you need the hospital records to refresh your memory? [76]

The Witness: If they ask me about dates, I will.

The Court: What is it you want to know?

(Testimony of John F. Abele.)

Q. (By Mr. Peterson): Doctor, at the time of her admission to Good Samaritan Hospital did she have muscle spasm of her back?

A. Yes, she did.

Q. What is the significance of that, Doctor?

A. Muscle spasm is nature's method of splinting or supporting a sore area or, in this particular instance, joints, and you observe the muscles splinting by seeing the absence of normal curvatures that people have such as in this accident there would be a flattening of the back rather than having a little sway. There may be a little tilting to one side or the other which nature does in the way of splinting, and that was present in her case for several days.

Q. Doctor, to a medical expert state whether or not that is evidence to you of recent injury?

A. Yes, it is.

Q. Doctor, assuming that the patient had no pain in her back prior to this accident of May 3, 1953—strike that——

Assume that she fell at the entranceway to Jake's Crawfish on May 10, 1952, and injured her chest, and assume that she had some pain in her low back. Assume that the pain in the chest and the back both cleared up in a matter of weeks, and from that time until the injury which she [77] described to you she had no pain in her back. Now, Doctor, would you have an opinion as to whether or not the previous injury of May 10, 1952, had anything to do with that injury which you have described?

(Testimony of John F. Abele.)

Mr. Gearin: Objection, your Honor, on the basis it assumes facts not in evidence.

The Court: I think, Mr. Peterson, that there is no evidence in the record to indicate that this injury to her back cleared up in the space of two or three weeks. In fact, I think that the witness, or the plaintiff admitted in a deposition that was taken some three months after the accident was that she was still suffering from pain with this condition that occurred at Jake's.

Mr. Peterson: Well, your Honor, as I recall her testimony, I think as to the clearing up within weeks, I do not think that was in evidence, and I would propose to call a witness and to ask her about that, and I would tie it up by appropriate questions to the witness, if permitted.

Mr. Gearin: I will stipulate it can be done later, your Honor, to suit the convenience of the court.

The Court: Answer the question then. Assume that the back condition cleared up in a matter of weeks from May, 1952. Then what do you want to know?

Mr. Peterson: I want to know if that is of any medical significance, in your opinion, following the injury of May 3, 1953? [78]

The Witness: Very remote. I would like to know if people had injuries before, but if she had no symptoms for a period of eleven and a half months, why, I would not think that it would have any relation.

Q. Doctor, do you recall whether or not you re-

(Testimony of John F. Abele.)

lated to the patient anything in respect to her back support while she was under your care?

A. There is hardly a day goes by that I do not say. I do not recall the specific instance, but I would be very surprised at myself if I hadn't.

Q. Do you recall having told her anything in respect to wearing a corset or a girdle?

A. Oh, I know I did here this February, that if she was still having symptoms that kept coming back all the time that we should try a support for a while, and if it did not work and she could not get away from the support and wanted to, why, she should have a fusion operation.

Mr. Peterson: No further questions.

Mr. Gearin: Nothing further, your Honor.

The Court: That is all, Doctor. You are excused from further attendance at the trial.

(Witness excused.)

Mr. Peterson: May I make an offer of proof at the recess without having to ask the doctor questions by just stating what the question would be? [79]

Mr. Gearin: What doctor?

Mr. Peterson: Dr. Abele.

Mr. Gearin: I do not think that is appropriate.

The Court: Are you talking about the fact that Mrs. Walker testified that her condition cleared up in a matter of weeks?

Mr. Peterson: I desire to make an offer of proof that the Court related to me that I could make.

Mr. Gearin: I will stipulate as to that. I talked

it over with Mr. Peterson. I know the matter to which he refers, your Honor.

The Court: Do you want to make an offer of proof during the recess?

Mr. Peterson: Yes, on the recess.

The Court: You may do so.

Mr. Peterson: May I do it in the absence of the doctor?

The Court: Yes. [80]

PHILIP SELLING

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

The Court: What is your specialty?

The Witness: Internal medicine and neurology.

Mr. Gearin: We will stipulate he is qualified in that field, your Honor.

The Court: It is stipulated that Dr. Selling is a qualified physician and that he specializes in internal medicine and neurology.

Direct Examination

By Mr. Peterson:

Q. Dr. Selling, are you associated with the Portland Clinic in Portland, Oregon? A. Yes, sir.

Q. Dr. Selling, has Dorothy Walker been a patient of yours? A. Yes.

Q. When did you first see her?

A. I saw her first on October 21, 1953.

Q. Doctor, did you examine her at that time?

(Testimony of Philip Selling.)

A. I examined her at that time.

Q. Did you obtain a history of injury from her?

A. I did so, yes.

Q. What was the history of injury?

A. The history was that she has been [81] driving——

Mr. Gearin: Your Honor, may I interpose an objection. I would like to ask Dr. Selling a preliminary question if I may.

The Court: What is the question?

Q. (By Mr. Gearin): Dr. Selling, was Mrs. Peterson referred to you for examination or for the purpose of treatment?

A. She was referred to me——

Mr. Peterson: Counsel, this is Mrs. Walker. You said Mrs. Peterson.

Mr. Gearin: I am sorry. I have been thinking about you all afternoon.

Was Mrs. Walker referred to you by Mr. Peterson for the purpose of examination or for the purpose of treatment?

The Witness: She was referred to me by Dr. John Tuhy for treatment, and it was stipulated a report be sent to Mr. Peterson.

The Court: Proceed.

Mr. Gearin: Go ahead.

The Witness: The history related was that at an early day in May, and I learned from the report sent to me this was approximately May 3rd, she had been driving along a highway near Albany, Salem, and had noticed a truck coming the opposite

(Testimony of Philip Selling.)

direction, which truck had forced her to swerve off the highway. She recalled nothing until about thirty to forty-five minutes later at which time she first noticed consciousness again. She stated that when she regained [82] consciousness she had severe pain in her head, neck, hip, and that she had been vomiting, had coughed up and vomited blood which was present at her mouth. She related that friends told her but she could not recall this, that she had gone over the embankment in a car and had crawled back up although she didn't remember anything about this particular crawling experience. She stated she had been sent to a hospital from which she had been transferred to Matson Memorial Hospital on the East Side where she had received treatment and had been there at, I believe, Good Samaritan Hospital for a period of about three to four weeks—I think she said about three weeks—receiving treatment for the neck and back, and the head symptoms at that time being related primarily to the neck disturbance.

Mr. Gearin: Your Honor, I note that Dr. Selling is referring to the notes, and I know from personal knowledge that those are notes that have not been marked with a pre-trial exhibit number. I would have no objection to them except for the fact that it was not until today that I was advised that there had been a neurological examination, and I have not seen it, so that for that reason I am going to object to it as much as I dislike to do so.

The Court: First, we will have the notes marked.

(Testimony of Philip Selling.)

(Document, notes of Dr. Selling, marked Plaintiff's Exhibit 19 for identification.)

The Court: When did you first examine Mrs. Walker? [83]

The Witness: October 21st.

The Court: Of what year?

The Witness: 1953.

The Court: Are you contending that you attempted to find out whether Dr. Selling had examined her, from somebody else, and that this information was withheld?

Mr. Gearin: No, your Honor, I am not, but I just did not know about it, and it was subsequent to the deposition.

The Court: Subsequent to the deposition?

Mr. Gearin: Yes, the deposition was taken before his examination, Dr. Selling, and I do not know at that time—of course, the plaintiff had Dr. Selling. I did not have any knowledge or information that she had been subsequently examined by him. I make no accusation for anything that has been withheld so far as this examination is concerned.

Mr. Peterson: I furnished counsel with the doctor's report which has been marked here, I believe Mr. Young.

Mr. Gearin: We had copies some time ago of Dr. Abele's and Dr. Tuhy's report.

Mr. Peterson: Did I not tell Mr. Young that he had been given a copy of the report?

(Testimony of Philip Selling.)

Mr. Gearin: We have not received a copy of it. I have no knowledge of it. Mr. Young is not here.

The Court: We will mark it. From now on, Mr. Peterson, I suggest that you list the names of the doctors under the [84] exhibits. There are no doctors listed in your list of exhibits. Proceed.

Mr. Peterson: Proceed, doctor.

The Witness: She had had following this injury and a period of hospitalization a continuing series of headaches, and she had noticed frequently giddiness and a slight sense of insecurity on turning which had not given her too much trouble, but it had required something to particularly relieve the head pain. The reason for which I was asked to see her was that she had began to suffer dizziness and fainting spells as well as headaches. In mid September, the date being forgotten, she got out of bed and nearly fainted. Then on October 1st she remembers getting out of bed, going down to make some coffee, walking from one room to another, suddenly turning the head and body and nearly fainting and becoming sick to her stomach and having a sense of true vertigo as those with seasickness feel. The next upset occurred November 11, 1953, when she got up to leave a movie at the Orpheum Theater when she suddenly started to leave consciousness, fell down forward and very shortly afterwards was able to get up. She did fall down several stairs and bruised herself badly. This is all the instances, the history which I obtained as

(Testimony of Philip Selling.)

it relates to the accident. There were other details such as previous operations and previous illnesses, which, I presume, are a matter of record and did not seem to bear on this illness. [85]

Q. Doctor, did you examine the patient at the time? A. I did.

Q. What did your examination consist of?

A. The examination consisted of a complete neurological examination including an appraisal of the psychiatric state. It was my opinion that she was sane and sensible, co-operated well, was not emotionally unstable. I do not remember whether she had a headache on the day of the examination. There was a little numbness of the left upper chest, arm and head, which numbness, I presume, had been due to some brain injury. It was definite, and it followed the distribution of the nerves which made it very evident to me that it was a real and not a simulated numbness. She had a very slight numbness of that hand which, well, could have been due to numbness and could have been due to brain injury. The one single significant fact which I picked up on the examination was that a sudden change in her position, sitting up suddenly or lying down suddenly, would make her eyes tend to rotate in a peculiar fashion which we call nystagmus. This is something which means that either the brain or inner ear has been affected in some way. This could be produced only, as I say, when she suddenly changed position. There were no other changes whatsoever. A spinal puncture was performed, and nothing was found

(Testimony of Philip Selling.)

such as pressure on the brain or brain disease. A radiogram X-ray of the skull was taken which I regret I did not bring [86] but which was entirely normal and showed no fracture. A brain wave test was carried out—we call this an electroencephalogram—in an attempt to find evidence of brain injury, and this test was reported as border line abnormal, and it reported furthermore there was a small spot in the left back portion of the head which we call the left occipital temporal region where the brain waves were not quite normal. It was my impression on inspecting these that these abnormalities were minimal, that they could be truly related to the accident but that they did not mean very much and that they are the sort of thing anybody could have from being punched in the head two or three times. That was the extent of our examination at that time.

My diagnosis was that she had had a concussion; that she was having post-traumatic headache; that she was having post-traumatic dizzy spells, and that these were readily attributable to that accident since I had no evidence of any other cause for such symptoms, but it was my impression at that time that the headaches, dizzy spells, numbness, and slight uncoordination of the arm would all disappear in time, and she was reassured to this effect.

Q. Doctor, have you seen her since that time?

A. Yes, I have seen her on February 16, 1955, at your request.

Q. Doctor, can you tell us the examination, the

(Testimony of Philip Selling.)

nature of the examination, and your diagnosis? [87]

A. On this last occasion?

Q. Yes, in the last examination.

A. On this last examination she was given a general examination, including the usual things a physician does with an examination, but I did not examine the back. Dr. Abele had taken care of that. I did not examine the pelvic organs since Dr. Lage had examined her in one of her usual checkups following her baby, following her delivery. I also examined her neurologically. She had a pneumothorax, a collapsed lung, which Dr. Tuhy probably would—that was no objective evidence of any disease whatsoever on this last occasion. In the general examination or neurological examination I did not repeat the skull. I did not repeat the spinal fluid because I saw no indication for redoing previously normal tests. I did have a brain wave test, which I have here, which showed again that borderline change which is something we see so frequently in normal people, and I would not be very loath to call this normal. At this last brain wave test it was observed that there was no evidence any more of this small spot in the back of the head which had previously showed some abnormality.

Q. Doctor, did you obtain an iterim history?

A. Did I what?

Q. Did you obtain an interim history? [88]

A. Yes, at that time she related that she was now having headaches which might last a few hours to all day; that they occurred from once every two

(Testimony of Philip Selling.)

weeks to perhaps two a week. I went into this in detail because she was using empirin and codeine, and we all know that codeine is a narcotic, and she related that she took them only on the days with headaches so I was reassured that she was using them properly and was not having continuous headache. She occasionally would continue to experience sudden vertigo when she would get up or lie down, and she stated that within the last year—she said in the last eighteen months she had had brief fainting spells on about eleven occasions. In spite of this, she had gone through normal pregnancy, the baby being born October 18, 1954. She herself was feeling in the best of condition. She had mentioned on her first examination a slight deafness of the left ear, and she mentioned it again on her second examination. It was a very minor border line decrease in hearing in the left ear which very well could have been an incidental finding quite commensurate with her age.

Q. Doctor, do you have an opinion as to whether or not she will have any pain in the future?

A. I believe so.

Q. In your opinion, how long will that persist?

A. Headaches of this sort have a tendency to gradually [89] disappear anywhere from one to three years, but they do disappear.

Q. Is it your opinion, Doctor, that the headaches will persist for a period of time in the future but then will clear up? A. That is correct.

(Testimony of Philip Selling.)

Q. Do you have an opinion as to whether or not she has any permanent brain damage?

A. I believe not.

Q. Doctor, in layman's language the concussion that you referred to, does that mean, are you referring to brain concussion?

A. A brain concussion such as one gets when they are hit on the head by any means.

Q. Doctor, you also mean brain damage by that term?

Mr. Gearin: That is leading, your Honor.

The Court: Go ahead and answer that, Doctor.

The Witness: The brain damage is the acute effect of an injury. The after effects are not permanent. There is no permanent damage unless there are a long series of injuries such as you find in a boxer who has been hit repeatedly.

Q. (By Mr. Peterson): Then, Doctor, would you characterize this as being temporary brain damage? A. Precisely.

Q. Doctor, will this patient require any further medical [90] care in respect to that injury?

A. No.

Mr. Peterson: No further questions.

Mr. Gearin: I have no questions, Dr. Selling. Thank you.

(Witness excused.) [91]

JOHN E. TUHY

a witness called in behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Mr. Gearin: We will admit the doctor's qualifications.

The Court: What is your specialty, Doctor?

The Witness: Diseases of the chest.

The Court: The qualifications of Dr. Tuhy are admitted. It is admitted that he specializes in diseases of the chest.

Direct Examination

By Mr. Peterson:

Q. Doctor, are you associated with any other doctor in the practice of your specialty here in Portland, Oregon?

A. Yes, with three other physicians, Dr. William S. Conklin, Dr. Lawrence Lowell, Dr. Gordon L. Maurice, all chest specialists.

Q. Doctor, has Dorothy S. Walker been a patient of yours? A. Yes.

Q. When did you first see her as a patient?

A. May I refresh my memory from my notes?

(Document, notes of Dr. Tuhy marked Plaintiff's Exhibit 21 for identification.)

Q. (By Mr. Peterson): My question is, Doctor, when did you first see her as a patient?

A. February 12, 1952.

Q. Doctor, did you examine her at that time?

(Testimony of John E. Tuhy.)

A. Yes.

Q. What was the nature of your [92] examination?

A. The history and complete physical examination with an X-ray of the chest and X-ray, fluoroscope.

Q. Doctor, at that time where was she?

A. In my office at the Standard Insurance Building in Portland.

Q. What was your diagnosis of her condition at that time?

A. It was pulmonary tuberculosis moderately advanced, still considered active. She also had a partial collapse of her left lung by air treatments.

Q. Doctor, did she have a history of having been confined in a tuberculosis institution?

A. May I say that that diagnosis of tuberculosis was first made in 1947 by Dr. Morton Goodman and that this diagnosis was confirmed at the Mayo Clinic in October, 1951?

She then went to the Oregon State Tuberculosis Hospital at Salem, and she was there from December 8, 1951, until February 3, 1952. Her air treatments to collapse the left lung had been taken at Salem in the latter part of December, 1951.

Q. Doctor, after February 12, 1952, when was the first time you saw her?

A. Three days later, February 15th.

Q. Did you follow her after that time?

A. Yes, I advised at that time that she return to the hospital at Salem. There were adhesions

(Testimony of John E. Tuhy.)

which prevented good collapse of her left lung by these air treatments, [93] and I suggested that she return to the hospital and have those adhesions cut. This was done. She went to the Oregon State Tuberculosis Hospital about February 1, 1952, and remained there until about May 1, 1952. The adhesions were cut during this stay. I saw her next to give her air treatments beginning on July 3, 1952.

Q. Doctor, did you see her around May 10th or May 15th, 1952?

A. I can't say, Mr. Peterson. In our office when air treatments are given the record is usually kept separate from the rest of the chart, but it is my recollection that I gave her air treatments beginning early in May of 1952 following her discharge from the TB sanitarium.

Q. Doctor, do you recall, did she give you any history of a fall or a chest injury involving Jake's Crawfish Restaurant in Portland, Oregon?

A. No, sir. I took an interim history on July 3, 1952, listing the various complaints and the present condition, and I see no notation that she had had an injury around May, 1952.

Q. Doctor, was there any change in her condition between May 1st and July 3, 1952?

A. Excuse me, Mr. Peterson, between what dates again?

Q. May 1, 1952, and July 3, 1952?

A. No, it seemed to me from the X-rays that the condition was essentially the same. I have a notation on July 3rd that her X-rays were satisfactory;

(Testimony of John E. Tuhy.)

that there was a few small [94] shadows in the upper part of her right lung; that her left lung is pretty well collapsed by the air treatments and no significant change in her condition.

Q. Doctor, did she continue as your patient after July 3, 1952?

A. No, for part of that time she was under the care of our out-patient clinic, the University State Tuberculosis Hospital in Portland, and I saw her on a number of occasions. Examinations were carried out again, for example, in September, 1952; November 11, 1952; again in December of 1952, and at about that time, I believe, she started to get her air treatments at the University Hospital.

Q. Doctor, did you see her in May, 1953?

A. Yes.

Q. What was the first time that you saw her in May, 1953?

A. About eleven a.m. of May 3, 1953.

Q. Where was the patient at that time, Doctor?

A. At Matson Memorial Hospital in Milwaukie, Oregon.

Q. Did you elicit a history of injury from her at that time? A. Yes.

Q. What history of injury did she relate to you?

A. If I may quote verbatim from the record I took at that time:

“Admitted to Matson Memorial Hospital about 11:00 a.m., May 3, 1953, by ambulance from [95] Albany Hospital. About 1:00 a.m. of May 3, 1953, while driving between Albany and Salem, the pa-

(Testimony of John E. Tuhy.)

tient says she was forced off the highway by an approaching truck passing a car. She swerved to the right off the road, and thinks she was unconscious for an unknown interval. She crawled out of the car in spite of severe pain in her right hip and crawled up a bank. Here she coughed up a little blood (she was also told she had vomited and coughed up blood in the car). She also noted pain just below the occiput—"that is the back of the neck. "After about one and a half hours she was taken to Albany Hospital, and X-rays of the hip and neck were taken." The X-rays of the hip were said to show a fracture. "Shortly after having the X-rays, she raised about 50 ccs of fresh blood, and then about 15 ccs—" which would be about a teaspoon full—"several times during the morning. She has noted some increase in dyspnea and 'heaviness' in the chest, with non-pleuritic aching," meaning it didn't hurt her worse to breathe, "in the left lower chest and back and in the lower part of her dorsal spine. Pain in the [96] lateral aspect of the right hip—" that is from the side—"has been continuous, as has the aching just below the occiput, not especially worse on turning, though it is worse on flexion and extension of the neck," meaning bending, bending backwards of the neck. Continuing the history: "She was discharged from the Oregon State Tuberculosis Hospital in April, 1952. Taking left pneumothorax refills about every ten days at the University of Oregon Hospital, usually 200-300 ccs," cubic centimeters of air at a time, "the last on

(Testimony of John E. Tuhy.)

May 1st. She sits up two or three hours a day and is on her feet about an hour a day. On her last examination about April 15th her X-ray was said to be O.K.”

The Court: This was at the University Tuberculosis Hospital?

The Witness: Yes. “She ran a fever in the evening to 100-101 for about two weeks in March (occasionally to 102), but the cause was not determined. Her usual low-grade fever, to 99.2 or 99.4, has also continued. She has been taking isoniazid and streptomycin,” which is a good TB drug, “since November, 1952.

“Her weight is 105 pounds, and her strength [97] usually fairly good.” In fact, it had improved in the recent months. “Her appetite is fine. She usually has no cough or sputum, no chest pain or wheeze.” Her shortness of breath on exertion is unchanged.

That was the extent of the history.

Q. Doctor, did you treat the patient at that time? A. Yes.

Q. Did you follow her after that?

A. Yes, because of the suspected hip injury and her head injury I asked Dr. Abele, the orthopedist, to see her. He could not make out any fracture of the head and advised that she be transferred to Good Samaritan Hospital where the special X-ray equipment permits better X-rays of the hip, and this was carried out on the morning of May 4th, twenty-four hours later. I saw her at Good Samaritan several times, and here she continued to spit up

(Testimony of John E. Tuhy.)

some blood, oh, an ounce or two ounces on May 5th, May 8th, May 11th, for example, and I also saw her following her discharge from—yes, I saw her while she was at Good Samaritan Hospital. After that she continued to go to the University Hospital. I next saw her on September 4, 1953.

Q. Doctor, what was your diagnosis of injury?

A. Of injury?

Q. Yes. [98]

A. Before she was transferred to Good Samaritan I suspected that she might have a fracture of the right hip, but this was not confirmed. There were no fractured ribs, and I concluded that she had had a blow to her left chest and that the bleeding was in all probability coming from her left lung and that the source of bleeding in all probability was the place where she had had her TB originally. In her X-rays taken after the injury there were no new shadows to indicate that ribs had been fractured or that there had been any severe bleeding in the lung as sometimes happens after severe chest injuries, but I believe that in the blow on her chest the lung had been shaken up and that the blood had probably come from an area of the TB scars in her upper part of her left lung because she was a TB patient who, incidentally, had had TB germs in her sputum in October, 1952—TB germs had been found in culture in October, 1952, and so we did not consider her cured at the time of the injury but just, her condition was considered quiescent. After Oc-

(Testimony of John E. Tuhy.)

tober of 1952, to my knowledge, all of her sputums have been negative, but in view of this positive sputum hospitalization was considered again at that time, and I advised her to start on treatment with the TB drugs.

The Court: We will take a ten-minute recess.

(Jury retires for recess.)

Mr. Peterson: If Dr. Abele had been asked the questions as to the low back injury including both the coccyx and the [99] lumbosacral sprain in relation to pregnancy, he would have testified that Mrs. Walker spent the greater part of her pregnancy in bed because of the danger of miscarriage because of an induced birth, lumbosacral strain, and the coccyx injury displacement. The doctor would further have testified, if permitted, that because of the displacement of the coccyx delivery was prolonged and painful; that it might not otherwise have been true, and also that they stimulated Mrs. Walker in order to induce childbirth early, approximately at six months, in order to avoid excessive pain and suffering to her during the childbirth at normal period and in order to promote the chances of the child living because of the condition of her spine.

The Court: You said at six months.

Mr. Peterson: Seven and a half months, your Honor, seven and a half months.

The Court: I think you had better get the doctor back here. I do not think he is going to testify to that, and I do not want anything in the record as an

(Testimony of John E. Tuhy.)

offer of proof unless I believe that the doctor will so testify so if you want to make an offer of proof bring the doctor back at any time, and I am going to ask questions. I am going to reject it anyway for the reason that the pre-trial order does not disclose any of these contentions. Mr. Peterson, you are not an inexperienced lawyer in this court, and you [100] know the rules here, and the rules require specificity with reference to the type of injuries or nature of injuries which the plaintiff sustained; therefore, I will not permit this evidence to be introduced. I made an exception on the part of Dr. Selling although we do have a rule here that when new evidence is brought in which the other party had no opportunity to anticipate, he is entitled to a postponement of the trial in order to try to meet that evidence. I did not do that as far as Dr. Selling is concerned, but this type of evidence would, in my opinion, require me to permit a re-examination of the plaintiff and to give them an opportunity to attempt to meet it. I will take the doctor's testimony at nine-thirty tomorrow morning.

(Thereupon, the jury returned from recess, and the following proceedings were had.)

Q. (By Mr. Peterson): Doctor, did you see her after October, 1952? A. Yes.

Q. Did you follow her as a patient?

A. Yes.

Q. Doctor, this is repetitious, but I think you said it was on May 30, 1953? A. Yes.

(Testimony of John E. Tuhy.)

Q. At the Matson Memorial Hospital?

A. Yes, sir.

Q. Did you follow her at the Good Samaritan Hospital? [101]

A. Yes, sir.

Q. Did you hospitalize her at any place following the Good Samaritan Hospital hospitalization?

A. I advised her to go to the University TB Hospital on June 3, 1953. Actually, that was soon after her discharge from Good Samaritan. I advised her to go there.

Mr. Peterson: Would the clerk hand the witness Exhibits 30-A, B, C, and D?

(X-rays marked Plaintiff's Exhibits 30-A, B, C, and D for identification.)

Mr. Peterson: Counsel, do you object to any of these?

Mr. Gearin: I have no objection to any of the X-rays.

Mr. Peterson: They are offered in evidence.

Mr. Gearin: No objection.

The Court: They are admitted.

(X-rays previously marked Plaintiff's Exhibits 30-A, B, C, and D for identification received in evidence.)

Q. (By Mr. Peterson): Doctor, I wonder if you would take the films and tell the jury what those films show?

A. This film was taken on April 1, 1953—correction, March 31, 1953, at the University TB Hos-

(Testimony of John E. Tuhy.)

pital. These were taken about five weeks before the accident. This is her right lung, her left lung and her heart. The left lung is collapsed about 50 per cent by air. This is the air that has been injected here, has collapsed her left lung because [102] of her tuberculosis and rested. The TB shadows are seen in the collapsed upper portion of the left lung here with some thickening of the lining of the lung. This white shadow at the extreme left base is due to a little bit of fluid here. She also has a few TB shadows at the very tip of the right lung. These are just blood vessel shadows in the lung so the TB is in the upper part of the left lung and to a slight extent in the top of the right lung.

The next film was taken May 3, 1953, at Matson Memorial Hospital. This shows the collapsed lung looking somewhat greater than before, but this is due to her having gotten an air treatment a few days before so it pushes the lung down a little more. The ribs here do not appear to show any fracture, and the shadows in the lungs seem to be about the same as they did five weeks before.

This film was taken ten days after the accident, May 13, 1953, at Good Samaritan Hospital. The appearance again is much the same as before, the collapsed left lung. The shadows in the upper parts of the lung are about the same, a small amount of fluid at the lower part of the left lung.

This film was taken a month after the accident at the University TB Hospital, June 2nd, 1953. The lung has expanded a little bit because she has not

(Testimony of John E. Tuhy.)

had air probably for a few days, but the shadows in the lung are essentially the same. Sometimes the shadows look a little [103] lighter and a little darker due to the X-ray being taken differently, but careful consideration of these films does not show any new shadows in the lung, to my knowledge.

Q. Doctor, is the fluid in the lung of any significance, taken ten days after May 3rd?

A. Well, I thought not because the small amount of fluid outside the lung here was present even before the accident. This was a common occurrence with people getting air treatments to have a little bit of fluid outside the lung in the left chest, and Mrs. Walker had that from time to time both before and after the accident, and it did not seem to increase.

Q. Doctor, what was your diagnosis of Mrs. Walker's injury?

A. I believe I gave that before, but essentially that in the first place she had a pulmonary tuberculosis, pre-existing moderately advanced tuberculosis, which was considered quiescent. We did not call it healed because she had had a positive sputum in October, 1952, but it was quiescent, and that she had sustained probably a contusion or a blow on the left lung, and that the bleeding that she complained of at that time of the accident and for a number of days afterwards at Matson and at Good Samaritan Hospital, that this bleeding came in all probability from the weak area in her lung where her healing TB shadows, where—it is common in TB to have

(Testimony of John E. Tuhy.)

areas of dilated bronchial tubes and blood vessels, and bleeding can happen in those even without any injury, and in the course of an injury it may produce [104] bleeding.

Q. Doctor, did this affect her tuberculosis?

The Court: I did not hear the question.

Q. (By Mr. Peterson): Did this injury affect her tuberculosis?

A. In my opinion, it did not adversely affect the course of her tuberculosis. The reason that she was put in the hospital, the TB hospital, on June 3rd a month after the injury was that she had had these episodes of blood-spitting, and they had continued for, as I remember, about two weeks after the accident from time to time, and I thought that we should take this precaution of having her studied in the hospital where the doctors could look down the bronchia to see if they saw any bleeding and take special X-rays of the lung, test her sputum, and see if the injury had produced any adverse effect or spotting.

I saw her films at the University Hospital and had read the reports, and my conclusion would be that the injury and the bleeding did not produce any adverse effect.

Q. Doctor, do I correctly understand you that she had some scar tissue on her left lung?

A. That is correct.

Q. As a result of tuberculosis?

A. That is correct.

Q. And that a contusion to that area of the chest

(Testimony of John E. Tuhy.)

produced bleeding from that scar tissue; is that correct? A. That is my belief. [105]

Q. Doctor, do you have any opinion as to whether or not there has been any dissemination of the tuberculosis?

A. No, I think not. There is the possible danger—if a person with active TB gets hurt on the chest and bleeds, there is a danger that the blood with TB germs in it will go around the same lung or go to the opposite lung. If it is going to do that, shadows will appear in the lungs. Now, these did not show up in the X-rays so I believe no spot occurred as a result of bleeding and injury.

Q. Do I correctly understand you, doctor, that the reason you hospitalized her at the tuberculosis hospital was to follow her? A. Yes.

Q. Was that hospitalization due to injuries or this lung condition?

A. Yes, in other words, if it had not been for the injury we would have let her stay home as she had been before, let her stay home, just keep on her TB medicines, keep at bed rest, but because of injury and blood-spitting it seemed prudent and the safe thing to have her go to the hospital for these special examinations and observation.

Q. What is your bill?

The Court: For what purpose, for what time, for what period?

Q. (By Mr. Peterson): For the period of time following May 3, 1953, and the treatment of the injuries which you [106] have described.

(Testimony of John E. Tuhy.)

A. I don't remember. I believe our office furnished a complete statement from the time——

Mr. Gearin: If you find it later, Mr. Peterson, I will stipulate with regard to it.

Mr. Peterson: I will submit it, counsel.

Mr. Gearin: How much is it?

Mr. Peterson: \$157.

Mr. Gearin: We will stipulate that is reasonable but not our liability for it.

The Court: I think that is included in the \$936.13; is it not?

Mr. Peterson: I think, according to my computation that was \$137.

The Court: It is \$20 more.

Mr. Peterson: Yes. No further questions.

Cross-Examination

By Mr. Gearin:

Q. Doctor, I note here, these are your reports from your office, it is your impression under date of April, 1953, as follows, and I am going to read it, and you will correct me if I am reading it wrong:

“In my opinion, this patient sustained contusion of the lung in her automobile accident of 5-3 which does not seem to have adversely affected the pulmonary tuberculosis. From the chest [107] standpoint, she would have no permanent disability as a result of the accident.”

That is contained in your record file; is it not, doctor? A. Yes.

(Testimony of John E. Tuhy.)

Q. That is correct, is it not?

A. I believe that to be true.

Mr. Gearin: Thank you, doctor. I have nothing further, your Honor.

Mr. Peterson: No further questions. That is all.

The Court: That is all. You are now excused.

(Witness excused.) [108]

GARY WALKER

a witness called in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Your name is Gary Walker?

A. Yes, sir.

Q. How old are you, Mr. Walker?

A. Sixteen.

Q. Is your mother Dorothy S. Walker who sits here on the right? A. Yes, she is.

Mr. Bailiff, I wonder if this might be handed to the witness.

(Document presented to the witness.)

Q. Mr. Walker, do you recognize what has been marked as Plaintiff's Exhibit 1-G, I think it is? Turn it over and look at the back. A. Yes.

Q. Did you, yourself, personally take that picture? A. Yes, I did.

Q. Where was that picture taken?

(Testimony of Gary Walker.)

A. It is a picture taken at the embankment at the scene of the accident on which the car is down, it is on this embankment. [109]

Q. Is it looking downwards?

A. Yes, sir, at a slight angle.

Q. I hand you other films. (Presenting to the witness.) A. Yes, I took these.

Q. Were those other films taken by you?

A. Yes, they were.

Q. What was the date that they were taken?

A. They were taken on the 3rd.

Q. What month and what year?

A. That was, oh, the day of the accident.

Q. Can you tell us what day it was?

A. It is the 3rd. The month just slipped my mind.

The Court: Do you know what day it was taken?

Mr. Peterson: Yes, May 3, 1953.

The Witness: I was not sure of the month. It slipped my mind.

Q. Who was with you at the time the pictures were taken? A. My grandmother, Mary Fry.

Q. What is her name? A. Mary Fry.

Q. That is your grandmother? A. Yes.

Mr. Peterson: You may take the witness. We offer that in evidence, your Honor.

Mr. Gearin: I object to it, your Honor, because the witness does not know when the accident took place. He [110] was not there. It is incompetent. He went down after the accident was all over, and he takes pictures—

(Testimony of Gary Walker.)

The Court: Let me look at this picture. What about all the other pictures that are admitted to which you did not object?

Mr. Gearin: Well, those are pictures of the scene. I do not object to them, but I do not know what that one is, your Honor. I cannot tell. I do not know what that one depicts. I have never seen it before.

The Court: (To the witness): Did you take those other pictures also?

The Witness: Yes, I took them all on the same roll of film.

The Court: Where is this scene as compared to the other pictures?

The Witness: It is at the same place, except it is looking at the embankment from a slight angle.

The Court: How did you determine that this was the place of the accident?

The Witness: By the marks where the car had been from where they pulled it out.

The Court: The objection is overruled. I am going to admit it.

(Photograph, Plaintiff's Exhibit G for identification, received in evidence.)

Mr. Gearin: May I call Dr. Jones? [111]

The Court: Ladies and gentlemen of the jury, in spite of the fact the plaintiff has not yet completed her case, it was agreed earlier that the medical witnesses could go on out of order; therefore, Dr. Jones is being permitted to testify at this time. [112]

ORVILLE NOBLE JONES

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

The Court: What is your specialty, doctor?

The Witness: Orthopedic surgery, your Honor.

The Court: Are Dr. Jones' qualifications admitted?

Mr. Peterson: His qualifications are admitted.

The Court: Ladies and gentlemen of the jury, it is admitted that Dr. Jones is duly qualified to practice medicine in the State of Oregon and that he specializes in orthopedic surgery, and he is a qualified orthopedist.

Direct Examination

By Mr. Gearin:

Q. Dr. Jones, did you at my request conduct a physical examination of Mrs. Dorothy S. Walker?

A. Yes, sir, I did.

Q. What date was that, doctor?

A. May I have my notes to refresh my memory?

(Document presented to the witness.)

The examination was made on February 9, 1955.

Q. Doctor, where was that examination conducted? A. In my office.

Q. Did you during the course of your examination cause X-ray photographs to be made of this lady's person? A. Yes.

Q. Did she at that time give you a history of injury or [113] trauma? A. Yes, sir, she did.

(Testimony of Orville Noble Jones.)

Q. Will you relate to the jury what this lady told you with reference to how she got hurt?

A. Yes.

Mr. Peterson: I object to that, your Honor.

The Court: On what ground do you object?

Mr. Peterson: On the ground that it is not a history related to the witness as a treating doctor.

The Court: This is an adverse witness, Mr. Peterson. The objection is overruled.

The Witness: The history given to me was that—by the lady in question—she described injuries sustained in an automobile accident while she was driving her automobile on May 3, 1953, in the vicinity of Albany. She stated that she was forced off the highway while driving due to a large truck trailer passing another car on a curve on a hill. She stated that her car skidded and rolled down about a 60 foot embankment. She stated that the passenger riding with her was thrown out of the car and that she herself was severely shaken up within the car but that she did not fall out. She stated further that she was unconscious for some period of time. She awoke on the floor of the car, noted that she had vomited or coughed up a large amount of blood. She then made her way out of the car with great pain and difficulty due to injuries of her left chest, pelvis, right [114] hip and neck, and in addition, multiple bruises and contusions to various parts of the body. She stated she was able with difficulty to crawl up the bank to a point where she attracted the attention of passers-by, after which

(Testimony of Orville Noble Jones.)

both she and her passenger were taken to Albany Hospital. She then was transferred to Matson Memorial and later to Good Samaritan where later she was under the care of Dr. John Abele.

She explained to me the complicating feature of her being a tuberculosis patient necessitated further hospitalization at the Oregon State Tuberculosis Hospital. She stated, however, that as far as she knows the accident had not further activated her arrested lung tuberculosis. There was at the time of my examination, to her knowledge, no known extension into the right lung following repeated X-ray examinations. She stated she was in traction for some period of time at Good Samaritan, both head and neck traction, also leg traction, for which she was greatly immobilized. She complained of continuing headaches, some dizziness, ever since and stated that also she feels some impaired hearing in the left ear; that fainting spells which she had initially upon getting up have now subsided but that the dizziness and headaches have not completely subsided. She states that she carries out limited physical activity due to her tuberculosis and states that if she does very much walking she has pain related to the right hip at night. In addition, she has a very painful coccyx which she states [115] was not present prior to this accident. She further states that no treatment has helped the coccyx which is said to be displaced and will, according to her statement, require surgical excision.

(Testimony of Orville Noble Jones.)

She admits freely a prior accident about one and a half years before this accident at which time there was a fractured rib on the left, but she states that the pelvis and the back and the coccyx were not injured at the time of the prior accident. That was the history.

Q. Doctor, did you make a physical examination of her? A. Yes, sir.

Q. Will you tell the jury briefly how you made your examination before you tell us the results of it?

A. Well, the patient is prepared for physical examination by the nurse, and she is disrobed and clothed with a gown which is opened by the back for purposes of examination of the back, and then she is examined standing and then in a prone position on the examining table.

Q. Do you put the body through certain motions in the course of your examination? A. Yes.

Q. Did you make your examination with reference to the complaints that she related to you?

A. I did.

Q. Will you tell the jury, please, Dr. Jones, the results of your physical examination? [116]

A. Yes, sir. The patient was a small slightly built white female who appeared approximately of the stated age of thirty-five. She appeared in no extreme discomfort or pain at the time of my examination, but she sat guardedly on the edge of her chair apparently to protect against pressure upon the coccyx or tail bone. She stood erect with ease with a moderately good posture.

(Testimony of Orville Noble Jones.)

Q. Doctor, may I interrupt you there and ask you, in an orthopedic examination what is the significance of a person standing erect with ease and with good posture?

A. Well, in the first place, standing erect with ease is an indication that there was no pronounced persisting muscle spasm or limitation of motion of joints of the hip and back at the time of the examination, and this standing with what we consider to be a reasonable good posture would rule out any serious abnormalities of posture from either birth defects or from injury.

Q. Is that one of the things that you look for in your orthopedic examination, that is, how they stand and how they bear themselves?

A. Always.

Q. If you will continue, please, doctor.

A. There were no marked abnormalities of spinal curvature. There was one point of subjective tenderness over the mid portion of the cervical spine, that is, the neck, to the right of the spinous processes. The spinous process is a boney [117] prominence that you can feel in the center of the mid line of motion of the cervical spine.

Q. Doctor, before you leave the neck, was there any muscle spasm in the cervical spine?

A. There is no palpable muscle spasm in the cervical spine area.

Q. What is the significance of muscle spasm?

A. If there is irritation from any cause, be it injury or otherwise, in and about the joints of the

(Testimony of Orville Noble Jones.)

neck, there will be spasm of associated muscles to produce limitation of motion, and such spasm is detectable by feeling the tone of the muscles. I can only say that we know what we are feeling for. From past experience we know whether a muscle is taut or whether it is pliable.

Q. The absence of muscle spasm is indicative of what, doctor?

A. Is indicative of no irritation of the tissues surrounding the joints.

Q. All right now, did you try out the limitation of muscle throughout the cervical spine?

A. Yes, sir.

Q. Will you tell the jury how the plaintiff, that is Mrs. Walker in this case, how she acted and how she could move her cervical spine, if at all?

A. Motion of the cervical spine was carried out through the normal range, and it was without limitation and without complaint of pain. There was no involvement of either upper [118] extremity noted. There was no involvement of the upper back nor of the lower back, and there was no muscle spasm in the lumbar spine, that is, the lower spine. Motion of her lumbar spine was carried out through a normal range without pain.

Q. Doctor, when you say that the motion of the lumbar spine was carried out with normal limits without pain do you put them through certain definite motions to determine whether or not there is a limitation of motion or whether or not there will be pain?

A. Yes, sir.

(Testimony of Orville Noble Jones.)

Q. The act of unlimited or unrestricted motion with no pain is indicative of what, Dr. Jones?

A. That there is no present irritation in that part.

Q. If you will continue, please, with your examination.

A. But the pressure over the sacrum produced pain in the region of the coccyx. This is the tip end of the spine, the tail bone, terminal segments of the sacrum, and the coccyx were shortened and blunt, and pressure at the tip of the coccyx produced very marked pain subjectively.

Q. Doctor, I have noted that you have used the word "subjectively" before. Briefly speaking, what do you see when there is subjective pain?

A. Subjective in contrast to objective findings is some thing that is stated, complained of by the patient. In other words, it is a symptom rather than a sign, something that the patient tells the examiner rather than what the examiner [119] himself sees, feels, or hears.

Q. Did you see, feel, or hear anything in connection with the coccyx which would be a sign to you that there was anything wrong with the coccyx?

A. I felt that the terminal segments of the coccyx were shortened somewhat and rather blunt, comparatively speaking, but that does not necessarily mean an abnormality.

Q. Did you take any leg tests? A. Yes.

Q. What do you do when you do that, doctor?

A. Of greatest importance is the straight leg rais-

(Testimony of Orville Noble Jones.)

ing test which indicates whether or not there is continued irritation of muscles of the back, and the means of doing this test is simply to have the patient sit on the edge of the examining table, and then the examiner raises the straight legs. Now, most anyone can feel a little strain, a little pain in the muscles in back of the knee, but what we are getting after is pain referred to the back or to the hip or along the sciatic nerve, irritation, because in performing such a maneuver, we are not only placing on the muscles of the back, putting strain on it, but we are also putting a strain on the muscles of the sciatic nerve.

Q. What were the results of the leg tests?

A. Leg signs were negative with the exception of the leg raising on the right above 90 degrees which produced very slight pain in the right hip. This was a complaint [120] referable to the right hip, not to the back.

Q. Did you measure her leg?

A. Leg measurements, I did. They were equal.

Q. What is the significance of having equal leg measurements?

A. It means that there is no abnormality of posture which would be caused by one leg being shorter than the other and consequently possible alteration in the curvature of the back and prior irritation.

Q. Did you perform a neurological examination of her lower extremities?

(Testimony of Orville Noble Jones.)

A. Lower extremities, yes, sir, tested reflexes and sensation, and the neurological examination was negative. Reflexes were equal and active. Both knee jerks and ankle jerks sensation was not impaired of the lower extremities.

Q. Did you do anything with regard to motion in the left hip?

A. Yes, because of the complaint of pain in the right hip I checked the motion of both hips.

Q. Yes?

A. Motion in the left hip was carried through normal range without any limitation or pain. Motion of the right hip was limited to some degree in internal and external rotation. There was some pain on the extremes of these motions subjectively. There was, however, no limitation of flexion or of extension, adduction or abduction. That [121] is, the only limitation I noted was in rotation.

Q. In other words, in and out the hip motion was painless, and when you twisted it there was some——

A. Rotating.

Q. Rotated it.

A. Yes, then I did get some subjective distress over the right greater trochanter. That is the boney prominence over the hip.

Q. Of what portions of the body did you cause X-rays to be taken?

A. The cervical spine, lumbar spine, pelvis, and hip.

Q. When you say cervical spine, where is that?

A. That is the neck.

(Testimony of Orville Noble Jones.)

Q. And the lumbar spine is the low back?

A. Is the lower portion of the back, yes.

Q. The pelvis and the hip? A. Yes.

Q. Would your pelvis X-rays show the coccyx?

A. Yes.

Q. Was there any boney abnormality shown in any of the X-rays that you caused to be taken this year?

A. Of the coccyx?

Q. Yes. A. None.

Q. Was there any displacement or maladjustment?

A. None. [122]

Q. Doctor, what comments do you have with regard to this coccyx as far as the future is concerned?

Mr. Peterson: Your Honor, I would object to that.

The Court: I think that the question should be rephrased.

Q. (By Mr. Gearin): Doctor, in connection with the condition of the coccyx that you saw—was there pain on palpation of the coccyx?

A. Yes, there was subjective pain.

Q. Subjective pain. Is that in keeping with the history that you received from this lady that you have already told us about?

A. Yes, sir.

Q. What do you suggest, doctor, with regard to future treatment, if any, to alleviate the pain?

A. You ask what would be my course of treatment if I were treating the patient, Mr. Gearin?

Q. That is right.

A. Well, it is a difficult question to answer just

(Testimony of Orville Noble Jones.)

offhand. A period of how many months has elapsed now since——?

Q. Since May of 1953.

A. May of 1953. It is now nearly two years. I know that it has been suggested that excision of the coccyx may be required to relieve this lady's pain. There is a difference of opinion among orthopedic surgeons as to the efficacy of this procedure, of this measure, and I am not particularly prone to excision of the tail bone because I have found in [123] my own experience that many times the patients were not relieved to the extent that it was expected as a result, and, therefore, I will carry out conservative measures to the nth degree before I will resort—further, unless I see definite abnormality in the X-rays or evidence of fracture displacement, I am not prone to consider excision of the coccyx.

Q. What about a support, doctor, a low back support?

A. I have always used that and with marked success.

Q. From the history that you have received from Mrs. Walker, your examination and your study of the X-ray pictures, do you have an opinion as to whether or not these conditions as you now find them will or will not be permanent?

A. They should be taken one by one.

Q. All right, if you will, doctor, please.

A. No. 1: The chief complaint at the present

(Testimony of Orville Noble Jones.)

time, that of painful coccyx, the history is there, the patient's story is there, the subjective complaint is there, and I will not deny a painful coccyx. It is now some fifteen to eighteen months after the injury. The condition of painful coccyx commonly is a protruded one, is difficult to treat and is prolonged, but I never have yet seen one that did not respond in time to the proper measures and was not ultimately relieved. In other words, I do not believe that the condition is a permanent one that she will carry with her for the rest of her life. [124]

No. 2, the painful hip: This is of mild nature. There is nothing in the X-ray to suggest that there is any permanent damage to the hip joint; Therefore, I must assume that the condition is a relatively minor persisting involvement of the muscles and ligaments about the hip joint, and if it is such and in the absence of any arthritis of the hip, it will disappear in time.

Third and fourth, the neck and the lower back: The complaints are there; the objective findings are not there. I am unable to ascertain any disability at the present time as regards the neck and as regards the lower back.

Mr. Gearin: Thank you, doctor. You may inquire.

Cross-Examination

By Mr. Peterson:

Q. May I see your notes, doctor?

A. Yes.

(Testimony of Orville Noble Jones.)

Q. Doctor, have you ever removed a coccyx?

A. Have I?

Q. Yes.

A. Yes.

Q. How many coccyges have you removed?

A. I cannot tell you offhand.

Q. Can you tell us approximately how many?

A. No, I cannot tell you how many.

Q. Doctor, why did you remove a coccyx?

A. Because I felt justified in removing, due to what I [125] have explained to the jury before. There had been evidence of fracture, and there was displacement, dislocation, or malunion of the fracture of the coccyx as a result of the fracture.

Q. Then, doctor, do you remove them for displacement of a coccyx? Have you yourself removed them?

A. I have.

Q. What is the purpose of their removal?

A. The purpose of removal is to eliminate pain.

Q. Doctor, did I understand you to say that you had never seen a coccyx that had failed to respond to conservative treatment in the absence of surgery?

A. No, that was not my intended statement.

Q. Would you tell us what the intent of your statement was?

A. The intent of my statement was that in the absence of findings which I have just described, namely, deformity due to fracture or dislocation, displacement, an improper union, that I have never seen one that would not respond to conservative treatment ultimately.

(Testimony of Orville Noble Jones.)

Q. Doctor, you examined Mrs. Walker, the plaintiff here, on February 9, 1955, for the purpose of testifying; did you not? A. That is right.

Q. Doctor, you gave her an examination in your office, I believe? [126]

A. That is correct.

Q. You had X-rays taken in your office?

A. They were taken at my direction.

Q. Taken at your direction?

A. Yes. I do not have an X-ray in my office.

Q. Are you skilled in reading X-rays, doctor?

A. I beg your pardon?

Q. Are you skilled in reading X-rays?

A. I consider myself so in the field of orthopedic surgery, yes.

Q. I wonder if I might have a light box?

The Court: Which ones did you take, doctor, or don't you know?

The Witness: I can point them out, your Honor.

(X-rays produced.)

The Witness: Are all the X-rays here that I sent in?

Mr. Gearin: They are, doctor.

The Witness: Well, these are the ones.

The Court: What X-rays do you want?

Mr. Peterson: I want the X-rays that Dr. Abele testified concerning this woman's back injury.

(X-rays, Plaintiff's Exhibits 30-A, B, C, and D presented to the witness.)

(Testimony of Orville Noble Jones.)

(X-rays marked Plaintiff's Exhibits 31-A and 31-B for identification.)

Q. (By Mr. Peterson): Doctor, Exhibit 31-A is in the [127] X-ray leg box. Now, doctor, I would like to ask you if you see in the film any displacement of the coccyx? A. No, sir.

Q. You can see no displacement of the coccyx?

A. No, sir.

Q. Is it in normal alignment? A. Yes, sir.

Q. Doctor, are you familiar with the term spina bifida occulta? A. Yes, sir.

Q. Did you see any evidence of spina bifida occulta? A. Yes, sir.

Q. I beg your pardon? A. Yes.

Q. Where is that?

A. (Witness indicates on X-ray.)

Q. Doctor, what is the significance of a spina bifida occulta in a thirty-five year old woman who has had a lumbosacral sprain?

A. Relative to the lumbosacral sprain?

Q. Yes.

A. There is no significance, to my mind, whatever.

Q. No significance at all?

A. None whatsoever.

Q. Does a person, a woman who has a spina bifida occulta, have a structurally weak back?

A. She may or she may not have. She does not necessarily [128] have.

Q. Doctor, what is a lumbosacral sprain?

(Testimony of Orville Noble Jones.)

A. It is a wrenching strain or tearing, if you will, of the muscles and ligaments of the lower back involving the lowermost joint of the lumbar spine, the joint between the lumbar spine and the fixed pelvis.

Q. Doctor, is a spinal fusion a recognized surgical procedure in the treatment of severe lumbosacral sprain?

A. Is a spinal fusion a recognized procedure in the treatment of severe lumbosacral sprain?

Q. What is a spinal fusion of the lower lumbar area of the spine a treatment of?

A. Lumbosacral sprain is only one of the qualifications for spinal fusion. It itself is not a required prerequisite for spinal fusion.

Q. Doctor, why do you do spinal fusions of the lumbar area of the spine?

A. We do them because the patients have a combination of repeated—I mean a number of different attacks of the same type of pain and obvious disability in the lower back associated with inherent structural weakness at the lower back, and by that I do not necessarily mean the spina bifida that is shown here.

Q. Doctor, have you yourself done spinal fusions? A. Yes, sir, many of them.

Q. In that surgical procedure what do you do? [129]

A. It depends entirely upon what the individual condition is and how great the extent is. If we consider that the only joint involved in this weakness

(Testimony of Orville Noble Jones.)

is the lowermost joint, then our aim it to stiffen or stabilize this lowermost joint of the moving spine. That is, we speak of it as the lumbosacral joint, and in order to do so, and may I use Exhibit 31-B?

The Court: Use any exhibit you want, doctor.

The Witness: This is a lateral view of the same area. This is the joint that we were speaking of just now. It is neither practicable nor feasible to introduce a bone graft across the bodies of the vertebrae because such necessitates quite extensive procedure or entering the abdomen and cutting adjacent to the major arteries which is considered to be too dangerous; consequently, the procedure is performed in the back and the little joints on either side of the spinal column which permit this motion are curetted out of their joint cartilage and are packed in with new bone then in addition to the boney rings and spinous process, and then the lateral arches are denuded of their lining membranes down to fresh bone and are packed in with solid new bone which nowadays generally is taken from the pelvis, from the crest of the ilium over here. It used to be taken from the leg. We found this is more satisfactory.

Q. You examined Mrs. Walker on one occasion?

A. That is true.

Q. Doctor, is it your experience that a doctor, an [130] orthopedic surgeon, who treats a person following trauma and then follows through in a

(Testimony of Orville Noble Jones.)

course of treatment would be in a better position to diagnose injuries than a doctor who passes his opinion on a single examination?

A. Is better qualified to diagnose injuries?

Q. Yes, better qualified to diagnose injuries than the doctor who examines on one occasion?

A. Not necessarily so.

Q. In this instance did Mrs. Walker relate to you her course of treatment?

A. To some degree, yes.

Q. Did she relate to you that she was treated by Dr. John Abele, an orthopedic surgeon?

A. She did; she did.

Q. Are we dealing here with a question of opinions among you doctors? Is what you said just your opinion? A. With regard to what?

Q. With regard to what you—your diagnosis and suggested treatment?

A. What I said with regard to diagnosis and my suggested treatment certainly is my opinion. I feel that I am thoroughly qualified in that opinion.

Q. Doctor, did I understand you to say that in eliciting a history from this patient that she told you that she was— or that the car went over the embankment south of Albany, Oregon? [131]

A. South of Albany, Oregon.

Q. Do you know whether or not she told you south or north?

A. Mr. Peterson, it is my common practice to leave the room where the patient is being examined

(Testimony of Orville Noble Jones.)

immediately after I have completed taking a history, to go to my recording dictaphone, and to place the history on a record. Now, it is possible that in the interval of time I may have confused north and south, but it is my recollection and it is so stated on this record immediately transcribed that it was south. That is all I can say.

Q. Doctor, did she tell you that the car skidded and rolled down an embankment?

A. That is exactly what she told me.

Q. Are you sure of that, doctor? A. Yes.

Q. Upon your examination, this woman had pain in her coccyx, pain and tenderness in her coccyx; is that correct? A. That is correct.

Q. She had pain and tenderness in her right hip? A. Yes.

Q. She had pain in her low back, particularly on the right; is that not correct?

A. She complained of pain in the low back.

Q. All of those tests that you gave her were given to determine the existence of injury to her back? A. That is right. [132]

Q. It was confined exclusively to her back, to her low back, to her coccyx and the low back and not to the chest, head, or other injuries?

A. Just neck, upper back, shoulders, hips.

Q. She did not have anything wrong with her shoulders? A. No.

Q. She did not have anything wrong with her neck? A. No.

Q. She had something wrong with her right hip

(Testimony of Orville Noble Jones.)

and her coccyx? A. That is right.

Mr. Peterson: No further questions.

Redirect Examination

By Mr. Gearin:

Q. Doctor, did you feel that there was any need for Mrs. Walker to undergo spinal fusion at this time or any other time because of any condition that you found? A. A spinal fusion?

Q. Yes. A. No, sir.

Q. On the X-ray Exhibit 31-A again, I would like you, doctor, to point out, if you will please, where the three segments of the coccyx are and to illustrate and show the jury the lack of malformation which you reported.

A. The fixed portion of the sacrum which consists of several segments fused together ends at this point right here [133] where there is a joint visible. (Indicating.) Then the first or proximal segment of the coccyx is here. The second one is here, and the tiny terminal is down here (Indicating).

Q. When you line that up do you line it up with the sacrum, or do you line it up with your hips to determine whether or not it is present?

A. It is lined up with the sacrum. You see, the attitude of the patient on the X-ray table at the time that this picture was taken is tilted somewhat so that that would tend to give one a false impression, but, actually, in drawing a plumb line straight

(Testimony of Orville Noble Jones.)

through the sacrum it passes nearly directly through the coccyx. There is a little tilting off towards the right well within the range of normal limits. There are no two coccyges exactly like and none that are exactly symmetrical with your human body.

Mr. Gearin: I have nothing further, doctor.

Recross-Examination

By Mr. Peterson:

Q. Doctor, would you take your own X-ray of a similiar character and compare it with that one? Is there any difference with that one and the one you previously testified that Dr. Abele—

Mr. Gearin: He used that one too.

The Court: He used that one too. Dr. Abele used his X-rays.

Mr. Peterson: That is all. [134]

Mr. Gearin: That is all.

(Witness excused.)

Mr. Peterson: There has been referred to in the deposition of Mr. Burr what is called the driver's Sign-out Sheet that I have marked as a pre-trial exhibit which counsel has produced, and I will call Mr. Swan to identify it.

Mr. Gearin: There is no necessity. It has been identified by Mr. Swan.

The Court: It is admitted.

(Document, Driver's Sign-out Sheet, marked Plaintiff's Exhibit 10 for identification and received in evidence.)

Mr. Peterson: I think it might require some explanation, your Honor.

The Court: Very well, call Mr. Swan. [135]

T. M. SWAN

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. What is your full name?

A. Theodore M. Swan.

Q. Theodore M. Swan?

A. That is right.

Q. By whom are you employed?

A. West Coast Fast Freight, Incorporated.

Q. About how long have you been so employed?

A. About eleven years.

Q. In what capacity are you employed?

A. District Manager of the Portland area.

Q. Can you tell us just generally what your duties are?

A. Well, it is general duties of operating the company within this district, supervision of terminals and the local people working in this area, carrying on company business.

Q. Mr. Swan, are you familiar with the prac-

(Testimony of T. M. Swan.)

tices of the West Coast Fast Freight in respect to dispatch of trucks? A. Yes, quite familiar.

Q. There has been handed to you, I think, what has been marked as Plaintiff's Exhibit 10, and I will ask you what that is.

A. This is what they use as a driver's Sign-in and Sign-out [136] Sheet. It has two different—well, this particular one is a sign-out sheet. What we have, we have two different types of sheets. One is a sign-in sheet; one is a sign-out sheet. For example, if a truck came out of Seattle into the Portland District, into the Portland Terminal rather, he would sign in on one sheet showing the truck number, the trailer number, the manifest number which covers the load of freight, his point of destination, the time he arrives at the terminal, and then the driver signs it so that we would have a record of the equipment that comes in and out of the terminal at all times. This particular one here is a sign-out sheet. It shows at the top Station No. 2 which is identified for Portland. Portland station in our company is known as Station No. 2. It carries the date of 5-2-53. This the Portland sign-out sheet under the date of May 2, 1953 and May 3, 1953.

Q. Do you see on that document the signature of M. L. Burr? A. No, I do not see it on here.

Q. I believe it is on the second page.

A. Oh, yes, it is there. I do.

Q. Are you familiar with the signature of M. L. Burr?

A. No, not his personal signature, but I have no

(Testimony of T. M. Swan.)

reason to believe but what this was not his signature.

Q. Are you personally acquainted with Mr. Burr? A. Yes, I am.

Q. On the night of May 2, 1953, was M. L. Burr in your [137] employ, employ of the West Coast Fast Freight? A. Yes, he was.

Q. Was he dispatched with a truck and trailer out of Portland, Oregon?

A. According to this sign-in, sign-out sheet, yes, he was. He was dispatched out of Portland.

The Court: Is there any question about that?

Mr. Gearin: No, your Honor, there never has been.

The Court: What is the purpose of this, to show that he was working in the course of his employment?

Mr. Peterson: No, we want to show the time that the truck left Portland, Oregon, and the time that it was at Jefferson Junction. That is the purpose of it.

The Court: Will that show it?

Mr. Peterson: This establishes a leaving point.

The Witness: Yes, this will show it.

Mr. Peterson: And a leaving time.

Mr. Gearin: There has never been any dispute about that.

The Court: Is that exhibit in evidence?

Mr. Peterson: Yes, your Honor. I think it ought to be explained; otherwise, the jury won't understand what it is. That is the purpose in mind.

(Testimony of T. M. Swan.)

Mr. Gearin: We have Burr's deposition, your Honor.

The Witness: This shows that Mr. M. L. Burr signed out in Portland Station with equipment 3499, trailer No. 7900 [138] and 7901; destination Oakland, at 10:40 p.m. According to this sheet, it was May 3, 1953.

Q. (By Mr. Peterson): May 3rd?

A. According to the heading on the sheet, yes, it was May 3, 1953.

Q. Mr. Swan, do you know what time the truck and the two trailers left Portland, Oregon? Do you know of your own personal knowledge?

A. No, I do not.

Q. Can you describe the appearances of that truck and the two trailers or that tractor and two trailers?

A. Yes, I can.

Q. Would you describe it to the jury?

A. 3499 I am not familiar with the make of it, but it is a single axle tractor, single axle drive tractor. In other words, we have a front axle and one driving axle 7900 and 7901 is what we call all doubles. In other words, it was a tractor with one semi. Then there is a trailer behind that, and you have three units on this, and we simply call them trains. We call them doubles. There is lots of them running around Portland in this vicinity. Consolidated Freightways are operating a lot of them at this time. It is what we call a set of doubles.

Q. What was the color of the tractor, the upper portion?

(Testimony of T. M. Swan.)

A. The Tractor, the bodies would be black, and the cab and hood would be red. [139]

Q. What would be the appearance or color of the two trailers?

A. These two trailers, if I recall them—are no longer in the fleet—are stainless steel Freuhauf trailers.

Q. Is there any sign or indication on the front portion of either one of those trailers?

A. I would have to quote that from memory. It is a company policy that all equipment carries lettering on the front end of each trailer.

Q. What color is the lettering?

A. It is red letters with a white background.

Q. What does it say?

A. "West Coast."

Q. Where is that lettering?

A. That lettering, on our equipment the standard policy is that it is mounted at the very top of the front of the van and also on the back doors.

Q. How long is that entire rig from the front end of the tractor to the rearmost portion of the trailer, the last trailer?

A. The over-all length of this equipment is 60 feet.

Q. Mr. Swan, do you personally know whether or not on May 2nd, 1953, the equipment that you have described there was equipped with clearance lamps?

A. What?

Q. Was equipped with clearance lamps?

A. I am positive of that. I say I am positive of

(Testimony of T. M. Swan.)

that [140] because all equipment goes through the shop before it leaves the terminal, for equipment inspection.

Q. Do you know whether or not it was equipped with reflectors?

A. I am confident that it was.

Q. When you say you are confident is that from your personal knowledge or do you just assume it?

A. That is from the company's procedures and policies that no equipment can go any place——

Q. Is it possible for the truck driver during the operation of that truck to discontinue the lighting of the clearance lamps?

A. I would say very doubtful when an employee that has been with the company as long as this man has and never violated a company policy.

Q. Now let me ask you, the thing I want to ask you is this: can a truck driver shut off Clearance lamps?

A. Not in our fleet, no. It is against ICC regulations. Your headlights have to be up with the——

The Court: Is it mechanically possible to do it?

The Witness: No, not under the ICC's regulations.

Mr. Peterson: I don't think you understand the question, Mr. Swan. Can a truck driver mechanically disconnect the clearance lamps whether it is against the ICC's regulations or not?

A. Oh, certainly he can reach in there and pull

(Testimony of T. M. Swan.)

the [141] wires off, something like that, but it is not connected by a separate switch.

Q. You do not have a separate switch for that?

A. Not for our rigs, no.

Q. On that rig?

A. I can't say about that, but I know our company has always complied with I.C.C. rules.

Q. Could you say as to that rig?

A. I couldn't say personally, no.

Q. Do you personally know when the truck arrived at any particular destination?

A. I couldn't say it personally. There is records to show when it arrived at destination or at different points, yes.

Q. Where are those records?

A. It is merely to show you like this. (Indicating Plaintiff's Exhibit 10.)

Q. What is a tachograph?

A. A tachograph is a mechanical device that records the speeds and revolutions of the motor.

Q. Is that part of your equipment?

A. It is not standard. It is an accessory part.

Q. Was there a tachograph on this rig?

A. I would say yes.

Q. Was there a record made of the movement of this rig [142] on the night of May 2nd and the morning of May 3rd, 1953?

A. It would record speed of equipment, revolutions of the motors, yes.

Q. Do you know where that record is?

A. No.

(Testimony of T. M. Swan.)

Q. Mr. Swan, do you know whether or not your truck driver, M. L. Burr, kept a driver's log?

A. Yes.

Q. Do you know where the driver's log is?

A. Do I know what?

Q. Do you know where the driver's log is concerning the log of May 2nd and May 3rd, 1953?

A. No, I know where it would be in our records, yes, but I couldn't say the exact location of it at this time.

Q. Have either of those records been destroyed, to your personal knowledge? A. No.

Mr. Peterson: You may have the witness.

Cross-Examination

By Mr. Gearin:

Q. How high is that sign on the first trailer?

A. Well, our trailers are twelve foot six over-all. I would say this sign, offhand actual measurement from the bottom of it would be right on 11 feet, and the top would be right on 12 feet. That is on the front end of the trailer.

Q. Mr. Swan, does the care of the tachograph and the driver's [143] log after the drivers turn them in come within your direct job? Do you have anything to do with keeping them?

A. No, nothing whatsoever.

Q. Isn't it a matter of fact that they are destroyed within ten days? A. How is that?

Q. Are not the tachograph and the driver's logs destroyed after ten days?

(Testimony of T. M. Swan.)

A. I couldn't say on that.

Q. You do not know about that one way or the other?

A. No, that is all handled in our transportation department. I am familiar with it.

Q. That is all up in Seattle, is it?

A. At the time it was. Now, it is in Oakland, California.

Mr. Gearin: That is all.

Mr. Peterson: That is all. Your Honor, I desire to read into the record as an admission part of the testimony taken of M. L. Burr.

Mr. Gearin: I think we had better have all of it, your Honor.

The Court: The entire deposition will be read into the record. Do you want to start reading at the beginning and go right straight through?

Mr. Gearin: I would like to direct the Court's attention to page 12, the question by Mr. Peterson, line 11, and the answer on lines 11, 12, and 13, which I think we [144] should take up in advance of reading the deposition, your Honor. This is page 12. Line 12, the information elicited on cross-examination by Mr. Peterson, we would ask that that be stricken.

The Court: Is there any objection?

Mr. Peterson: No objection.

The Court: It may be stricken.

Ladies and gentlemen of the jury, we are going to adjourn for the day. I desire to warn you that when you go home do not talk about this case to

anyone because both the plaintiff and the defendant are entitled to have you decide this case upon the evidence that is introduced in this courtroom and not upon any advice that you might get from some of your relatives or friends. It may very well be that they would give you good information, but the point is that there is no way for the attorney for the plaintiff or the attorney for the defendant to know what is told you, and you may get bad information that may be damaging either to the plaintiff or to the defendant; therefore, I urge you once again please do not talk about the case to anyone else. Please do not make up your minds as to how this case should be decided. You have heard only part of the testimony, and tomorrow morning you are going to hear the rest of it. Then you are going to hear from the attorneys, and the attorneys are entitled to a respectful hearing. You need not agree with them, but they are entitled to a hearing. [145] Then you are going to find what the law is from the Court. Until that time please do not make up your minds. Please return at ten o'clock tomorrow morning.

(Thereupon, the jury retired.)

(Discussion between Court and counsel.)

Mr. Peterson: I think we might dispose of one other matter while we are here. You have no objection to the Albany General Hospital records going into evidence; is that correct?

Mr. Gearin: I have not any objection to any

of the records going in, subject to his Honor's ruling that no opinion of the doctor's or of the nurses' go in or of letters of counsel. I wanted to say, your Honor, that there are numerous references to insurance in the Hospital records, and that is one thing I wanted to keep out.

Mr. Peterson: I think that would be proper, and we would not offer that, but I do offer the Albany General Hospital records in evidence, and I understand that you looked at it and said you would have no objection.

Mr. Gearin: I had no objection.

Mr. Peterson: Now, that includes the authorization by Mrs. Walker to Mr. Gearin and two other persons to examine the hospital records, the Albany Hospital records. You said you have no objection to them?

Mr. Gearin: No, just as long as you do not tell the jury who those other persons are. [146]

Mr. Peterson: If you object to it, I can offer it in evidence.

The Court: There is no question about that. Take that part out. With reference to the matters in the documents that refer to insurance, how are you going to take those out of the record?

Mr. Peterson: Your Honor, I am not going to offer in evidence the records of the TB Hospital nor the hospital records of Good Samaritan Hospital. The doctor referred to them to refresh his recollection, but I am not going to offer them in evidence.

Mr. Gearin: The Albany Hospital, to that I have no objection.

Mr. Peterson: The Albany General Hospital, and Matson Memorial Hospital?

Mr. Gearin: I have no objection to Matson.

Mr. Peterson: You have looked at it, and there were several documents.

Mr. Gearin: I looked at what you showed me.

The Court: Look them over, and if you do not have any objection we shall admit them tomorrow morning. If you do have objection, make your objection. Then I shall rule on it.

(Evening recess taken.) [147]

Morning Session, Thursday, February 24, 1955

10:00 a.m., Trial Resumed

(The following proceedings were had out of the presence of the jury:)

Mr. Peterson: Your Honor, I would want to read a part of the deposition of M. L. Burr for the purpose of offering it as an admission on the part of the defendant Burr.

The Court: How much of the deposition do you want to read?

Mr. Peterson: Not very much, your Honor. I think less than a page.

Mr. Gearin: I do not think that is fair, your Honor, to take a page out of the context.

(Discussion between Court and counsel.)

(Jury returns to the jury box.)

The Court: This was a deposition taken to perpetuate testimony, which may be somewhat different, but rule 26 (d) 4 provides: "If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce other parts."

Therefore, I am going to rule that if you want to introduce part of it the whole deposition will be read at this time. You may do it any time you wish.

Mr. Peterson: Very well, your Honor.

The Court: If you do not want to do that, then I understand that the other portion of the deposition which [148] was taken will be introduced anyway.

Mr. Peterson: Just so that the record shows that we do not desire to be bound by the testimony except as to the admission made by the defendant M. L. Burr.

The Court: You are never bound by the testimony of the defendant, an adverse party. It is just a matter of convenience. Do you desire to have the deposition read now, or do you want to have Mr. Gearin read the deposition in evidence?

Mr. Peterson: Let him read it.

The Court: Very well.

Mr. Peterson: May I have leave to recall Mrs. Walker?

The Court: You may. [149]

DOROTHY S. WALKER

recalled, testified as follows:

Direct Examination

By Mr. Peterson:

Q. Mrs. Walker, you have been sworn yesterday to tell the truth. You are still under oath. I assume that you understand that. A. Yes.

Q. Mrs. Walker, would you tell the jury what occurred in relation to injury on May 10, 1952, at Jake's Crawfish?

A. Yes, I was going down to Jake's with my son and a friend for dinner. In the entrance of the restaurant there was a rubber mat. When I stepped up on the mat it slid, rolled from under me, and I fell on my left side.

Q. Would you tell the jury what injuries that you received as near as you yourself know?

A. Some injury to my lung—or chest, I should say, not the lung; injury to my left—bruise to my left leg and upper left back.

Q. How long did you have pain or discomfort from those injuries?

A. I had some discomfort from the chest injury, I think, approximately two weeks, and about the same length of time for the severe discomfort from the leg injury. However, it was sore on pressure and continued to have some soreness, I think, until along in the early fall, about August perhaps. Then it completely went away. [150]

Q. Did you consult a doctor pertaining to those

(Testimony of Dorothy S. Walker.)

injuries? A. Yes, I did.

Q. Who was that doctor? A. Dr. Tegart.

Q. Do you know whether he is now living?

A. No, sir, I do not.

Mr. Peterson: Might I ask leave of the Court to ask the witness—it would really be rebuttal—with respect to the examination of Dr. Orville Noble Jones? It technically would be rebuttal.

Mr. Gearin: I have no objection at this time, your Honor.

The Court: Very well.

Q. (By Mr. Peterson): Mrs. Walker, how long did it take Dr. Orville Noble Jones to examine you on February 9, 1955?

A. You mean the Dr. Jones who was here yesterday?

Q. Yes, who testified.

A. Oh, approximately ten minutes.

Q. Did he take any notes at the time he first talked to you?

A. No, he did not. He came in this room where I was disrobed waiting for him and asked me questions, but he did not write anything down.

Q. Did he leave the room before making any notations at all? A. Yes, sir.

Q. Did you tell him that you were injured when the car in which you were riding went off the highway south of Albany? [151]

A. No, sir, I am sure I did not. I can't remember. It was a long conversation, and I couldn't possibly remember all of the exact words. I couldn't

(Testimony of Dorothy S. Walker.)

two seconds after we were completed talking. I do not think anyone could. I do not believe Dr. Jones could. It was a long conversation.

Q. Did you tell Dr. Jones that the car which you were driving skidded and rolled down an embankment?

A. I have never stated that the car rolled. I have said that I assumed that it did not turn over. I don't—I have never claimed to know what happened.

Q. But my question is did you tell Dr. Orville Noble Jones that? A. No.

Mr. Peterson: You may take the witness.

Cross-Examination

By Mr. Gearin:

Q. Mrs. Walker, do you recall where you were on August 27, 1952, if you were in Portland or not?

A. August 27th?

Q. Of 1952. You were in Portland; were you not? A. Well, sir, I would not really know.

Q. Were you outside of Multnomah County at that time?

A. Part of the time during that period I lived with my sister down in Siletz, and if you could tell me what you are referring to I can probably tell you.

Q. I am referring to an affidavit that was filed by [152] Mr. Pozzi, Mr. Peterson's partner, on August 27th wherein he verified a complaint for you

(Testimony of Dorothy S. Walker.)

on the basis that you were not within Multnomah County, Oregon, and that he had knowledge of the fact as of that date.

A. I am afraid I don't understand what you mean, Mr. Gearin.

Q. The significance, Mrs. Walker, of August 27, 1952, is this. There was on that date filed in the Circuit Court of the State of Oregon a complaint seeking the sum of \$25,000 general damages and an unstated amount of special damages by reason of the injuries which you sustained at Jake's. On that date Mr. Frank H. Pozzi, your lawyer and Mr. Peterson's partner, made an affidavit and filed it in that cause to the effect that you were not then within Multnomah County, Oregon, and that he had knowledge of the facts. Can you help us on that as to whether or not you were in Portland on that date?

A. I couldn't say whether I was in Portland on August 27th or not. If I was in Mr. Peterson's office and signed papers, I probably was; definitely I was. I know I wasn't living in Portland at that time.

Q. Mr. Pozzi was one of your lawyers at that time?

A. Well, Mr. Peterson and Mr. Pozzi are partners.

Mr. Gearin: I think that is all at this time, Mr. Peterson.

(Testimony of Dorothy S. Walker.)

Redirect Examination

By Mr. Peterson:

Q. Mrs. Walker, when was the last time when you were [153] treated by a doctor for the injury sustained on May?

The Court: I think this is going beyond the cross-examination. If you want to ask her about whether she was in Portland on that day, that is perfectly all right.

Q. (By Mr. Peterson): Mrs. Walker, can you say whether or not you were or were not in Portland, Oregon, on August 27, 1952?

A. Well, no, that has been too long ago. If I signed papers——

The Court: She does not know.

The Witness: I do not know.

Q. Did you authorize us to file a complaint for you on account of injuries sustained at that time?

A. Yes.

Mr. Peterson: That is all. Plaintiff rests, your Honor.

The Court (To Mr. Gearin): Call your witness.

Mr. Gearin: I would like, your Honor, if I may, at this time to have the clerk read with me the deposition of M. L. Burr, and I would like to call to Mr. Bishop's attention the fact that the question and answer beginning on line 11, page 12 have been stricken.

The Court: Ladies and gentlemen, I do not

know whether on any other case that you have sat on you heard any depositions read, but M. L. Burr who is a defendant resides in Washington. His testimony was taken for this trial. It was taken under courtroom conditions. In other words, [154] prior to the time that Mr. Burr began to testify he was sworn just as the witnesses here are sworn to tell the truth, and then he was interrogated by an associate of Mr. Gearin's, and he was then cross-examined by Mr. Peterson. All of his answers, as well as the questions, have been recorded, and now we are going to try to re-enact that situation here. Mr. Bishop, the clerk, will act as Mr. Burr, and Mr. Gearin will read the questions that were propounded to him by an associate of Mr. Gearin's. Mr. Peterson will ask the questions that were asked on cross-examination.

Mr. Peterson: Your Honor, I assume that the deposition is being read by the defendant, the West Coast Fast Freight, Incorporated, on behalf of West Coast Fast Freight, Incorporated, for the reason that M. L. Burr is not available as a witness. Do I correctly understand?

Mr. Gearin: It is being read on behalf of both defendants, your Honor, on the ground and for the reason that Mr. Burr cannot be here.

Mr. Peterson: Is not available as a witness?

Mr. Gearin: Yes.

(Thereupon, the deposition of Miles L. Burr taken February 12, 1954, at Seattle, Washington, and heretofore identified as Plaintiff's Pre-

trial Exhibit C for identification, was read into the record as follows): [155]

DEPOSITION OF M. L. BURR

Direct Examination

By Mr. Martin:

Q. Will you state your name please?

A. Miles L. Burr.

Q. And you live in Seattle? A. I do.

Q. Are you married? A. Yes.

Q. And how old are you? A. Pardon?

Q. How old are you? A. Thirty-eight.

Q. What is your present occupation?

A. Business agent for the Teamsters' Union, Local 174, Seattle.

Q. And how long have you worked in that capacity?

A. Since August—correction—since September 28, 1953.

Q. Prior to September 28, 1953, who were you employed by? A. West Coast Fast Freight.

Q. In what capacity? A. As a driver.

Q. How long have you had experience driving heavy truck equipment? A. Twenty years.

Q. Did you also work for the West Coast Fast Freight in [156] some capacity other than as a driver? A. Yes.

Q. What was that?

A. Various, including terminal manager, safety engineer, line dispatcher, loading foreman, and driver.

(Deposition of M. L. Burr.)

Q. When did you work as safety engineer?

A. From January, 1949, until August, 1950.

Q. Were you employed as a driver by the West Coast Fast Freight on May 2, 1953?

A. Yes, sir.

Q. What was your run at that time?

A. I was on what they call a roll and rest operation, running to and from Oakland, California, to Portland and Seattle.

Q. At that time was Portland your starting point for trips south?

A. For that particular trip, yes.

Q. Did you make a trip for the West Coast Fast Freight on May 2, 1953? A. I did.

Q. And what type of equipment were you driving on that particular trip?

A. It is known in the trade as a set of doubles or train, which consists of a tractor and two trailers.

Q. And what was your tractor number?

A. I will have to—— [157]

Q. (Interposing): I have it listed here. If you want to refresh your recollection——

A. (Interposing): 3499, I believe.

Q. Tractor 3499? A. Yes.

Q. And were the trailers 7900 and 7901?

A. That is correct.

Q. On that occasion you were carrying, I assume, a load of cargo? A. That is right.

Q. What time did you leave Portland?

(Deposition of M. L. Burr.)

A. I left Portland at approximately 11:30. The exact time—let us put it about 11:30.

Q. On what date?

A. May 2nd. That is p.m.

Q. That is May 2nd, 1953?

A. That is right.

Q. At about 11:30 p.m.?

A. That is correct.

Q. And what was your destination?

A. Oakland, California.

Q. And what route did you take?

A. 99 East.

Q. Did you make any stops on that run?

A. Yes.

Q. Where was your first stop after leaving Portland? [158] A. Cottage Grove, Oregon.

Q. What time did you arrive at Cottage Grove, Oregon?

A. Approximately 2:30. Let me see—I think that is correct. I would have to check the logs to be sure.

Q. How long a run is it from Portland to Cottage Grove? A. 147 miles.

Q. 147 miles?

A. Yes. I may be wrong on that arrival time. I would have to check the logs.

Q. Well, how long in hours generally does it take to go from Portland to Cottage Grove?

A. Oh, it would take——

Q. (Interposing): Would it take you at least three hours to drive down there? A. At least.

(Deposition of M. L. Burr.)

Q. Or longer? A. Or longer.

Q. Have you made that run a good many times so that you are familiar with the route?

A. Yes.

Q. Would it be closer to 3:30 that you arrived at Cottage Grove to go 147 miles?

A. It would be closer to 4:00: What did I say?

Q. You said at least three hours, which would make it 2:30.

A. Two-thirty would make a total of three hours. No, it would run closer to 4:00—it would be 3:30 instead of 2:30. [159]

Q. Did you make any stops at all between Portland and Cottage Grove on that occasion?

A. No.

Q. How long were you at Cottage Grove?

A. As I remembered, from the statement that I made later on in regard to this, I think there was some mechanical trouble which involved fixing a throttle arm, which consumed approximately an hour.

Q. Did you fix the throttle at Cottage Grove?

A. Yes.

Q. What was wrong with the throttle that required fixing?

A. Well, the throttle rod or the throttle lever became disengaged from the actuating arm on the fuel pump. The cotter pin came out of it, and I replaced the cotter pin with a piece of wire.

Q. Is that a common thing? A. Quite.

Q. On that equipment? A. Yes.

(Deposition of M. L. Burr.)

Q. Does that come about through ordinary wear?

A. Yes.

Q. And loosening up? A. Yes.

Q. Now from Cottage Grove where was your next stop?

A. I believe it was Roseburg, Oregon.

Q. And from there you went on to [160] Oakland? A. I went on south.

Q. And you eventually reached your destination? A. Yes, that is correct.

Q. Now, before leaving Portland on that trip did you inspect your equipment?

A. Thoroughly.

Q. And was the equipment—that is, the tractor and the trailers in good order when you left Portland?

A. In first-class condition; excellent condition.

Q. Did you have any trouble on the way other than with the throttle that you mentioned?

A. No.

Q. Was your throttle still working when you got into Cottage Grove, or was it missing, or what occasioned your stopping to fix it?

A. Well, it depends in what position your throttle arm is when it becomes disengaged. The engine will run away with itself, or you cannot get the engine to turn up. In this particular case it would not turn up. In other words, it fell off in the closed position.

Q. At what point on the trip did you first notice that the throttle was giving you any trouble?

(Deposition of M. L. Burr.)

A. You don't notice any trouble until it falls off. You have all your trouble at once in a case of that kind.

Q. Well, were you in Cottage Grove when it came to your attention? [161] A. Yes.

Q. Had you noticed it before that at all?

A. No.

Q. Now, what was the condition of the lights on this equipment?

A. The lights were in good working order, and burning.

Q. Do you remember passing South Jefferson Junction on the way from Portland to Cottage Grove?

A. I no doubt passed it, but there is no particular incident that would make me remember passing it.

Q. How far is it from Portland to South Jefferson Junction? How many miles?

A. It is seven miles north of Albany—seventy-five miles.

Q. Do you know what time you would normally go through South Jefferson Junction, leaving Portland at 11:30 at night?

A. A. Probably an hour and a half or an hour and forty minutes after leaving Portland.

Q. What time would that put you into South Jefferson Junction?

A. Eleven-thirty, an hour and a half later would be one o'clock or 1:10.

(Deposition of M. L. Burr.)

Q. Were you held up at any point on the road between Portland and Cottage Grove because of congested traffic or anything, or did you drive straight through?

A. I was not held up. There were no unusual events.

Q. Was it what you would call a normal trip?

A. Yes, quite. [162]

Q. Did you pass the scene of any accident on the road with reference to South Jefferson Junction?

A. No.

Q. Or anywhere in the vicinity of Albany?

A. No.

Q. As far as you know, did you keep on your side of the center line at all times driving south?

A. I did.

Q. Was your equipment involved in any accident on the way between Portland and Cottage Grove?

A. No, sir.

Q. Was your equipment damaged in any way?

A. No, sir.

Q. Now, after coming to Cottage Grove and repairing this throttle did you inspect your equipment again before you started out?

A. Visually you inspect your equipment every time you are on the ground. You look to see if all your lights are burning; you kick your tires to see that they are all with normal air pressure and in a sense you inspect the equipment again.

Q. Did you observe any marks on your equip-

(Deposition of M. L. Burr.)

ment or damage to your equipment at all at Cottage Grove? A. None.

Q. Then did you have occasion to inspect your equipment [163] again at Oakland?

A. Visually, yes.

Q. Before you came back?

A. Before I came back I gave it a thorough inspection on leaving Oakland.

Q. And did you observe any marks of damage to your equipment at all?

A. No; none whatsoever.

Q. A claim has been asserted, Mr. Burr, that your truck and equipment crowded another vehicle which was going north on Highway 99E in the vicinity of the South Jefferson Junction off of the road. Did you cause any other motor vehicle to go off the road at any point on that trip?

A. No, sir.

Q. As far as traffic is concerned, was there anything unusual about your trip from Portland to Cottage Grove that night?

A. Nothing unusual.

Mr. Martin: That is all.

Cross-Examination

By Mr. Peterson:

Q. Mr. Burr, your first name is Miles?

A. That is correct.

Q. What is your middle name?

A. Lincoln. [164]

(Deposition of M. L. Burr.)

Q. What is your home address here in Seattle?

A. 411 Boyleston Avenue.

Q. Did you formerly live in Portland, Oregon?

A. Never.

Q. In May of 1953, was your home in Seattle?

A. Yes.

Mr. Peterson: I think you did not desire me to read the following.

Mr. Gearin: You stipulated that it might be stricken.

Mr. Peterson: Beginning on that line, line 5?

Mr. Gearin: Yes.

Mr. Peterson: Where do you desire me to start in again?

Mr. Gearin: I think at the top of page 13 would be satisfactory.

(Thereupon, the reading of the deposition was continued as follows):

Q. (By Mr. Peterson): Mr. Burr, did I understand you to say that you left Portland, Oregon, that night at 11:30?

A. I actually moved out of town at that time.

Q. Now, when you say that you moved out of town, where did you get in the truck?

A. On company premises, Portland, Oregon.

Q. Where are the company premises that you refer to? A. 2500 Northwest 25th. [165]

Q. 2500 Northwest 25th?

A. That is right. That is the West Coast Fast Freight Terminal in Portland, Oregon.

(Deposition of M. L. Burr.)

Q. Now, when you get in the truck do you normally sign a company record, indicating the time that you depart?

A. Not exactly the time that you depart. It is the time that you report for work.

Mr. Martin: In that connection the attorneys in Portland asked me to show you the Driver's Sign-out Sheet for that day (handing document to Mr. Peterson), in case you desire to use it.

Q. (By Mr. Peterson): Mr. Burr, I hand you a document here which is not marked but has printed on the face of it "West Coast Fast Freight, Inc., 650 Hanford Street, Seattle 4, Washington," and down on the fourth line there appear the figures, "Truck No. 3499 and Trailer Nos. 7900 and 7901," and then the words, "Destination," and under the column, "Destination," the letters "Oak," and under the column "Time left," the figures "10:40," and then following that a signature, the signature purporting to be the signature of M. L. Burr.

Now, I will ask you, Mr. Burr, is what I have just read to you—does that mean that you came to work at 10:40, 20 minutes to 11:00, or does that mean that you departed in the truck from 2500 Northwest 25th Avenue at [166] the West Coast Fast Freight Terminal at 10:40?

A. The time entered in the column that you refer to, to which my signature follows, refers to the time that I reported for work. I might add that the bills and all the documents necessary to start a

(Deposition of M. L. Burr.)

trip are placed close to the time clock, and the sign-out sheets, and when I pick up those bills and punch my trip card out, I sign that time out at that time.

Q. Then that figure of 10:40 p.m., simply means the time that you reported for work?

A. That is correct.

Q. What was the usual hour that you reported for work?

A. Any time that I am called. Two hours following any time that I am called. That is in the Union agreement.

Q. Do you recall the kind of cargo that was being hauled on this truck and two trailers?

A. No, I don't recall.

Q. Approximately how long in length is the truck and the two trailers when the two trailers are hooked together and the two trailers hooked onto the truck? How long is the entire train?

A. Sixty feet.

Q. Do you recall whether or not you had a full cargo load? A. I don't recall.

Q. You don't remember the kind of cargo that you were hauling? A. No, sir. [167]

Q. Do you know what time you were destined to arrive in Oakland, California?

A. For Monday morning delivery, or second morning delivery, I should say.

Q. You mean by that, was there a specific hour that you were destined to arrive in Oakland?

A. No.

(Deposition of M. L. Burr.)

Q. Approximately how long did it normally take you to drive from Portland, Oregon, to Oakland, California?

A. The driving time involved totals approximately 20 hours—20 to 21 hours, and in between two sessions of driving at the wheel, to be in accord with the ICC requirements, you must take eight hours sleep or rest away from the equipment. It was a total of 28 or 29 hours after departure.

Q. Did you have a relief driver with you?

A. I beg your pardon?

Q. Did you have a relief driver with you?

A. No, sir.

Q. When you left Portland were you alone?

A. Yes, sir.

Q. Did you have in the truck a log—a driver's log?

A. Yes.

Q. And did you make any entries in the driver's log the following day or at any time within 24 hours from 10:40 p.m., May 2nd? [168]

A. The logs are kept on a current basis—current meaning within eight hours.

Q. And did you make any entries in the log—in the driver's log?

A. Yes, sir.

Q. When did you make the first entries?

A. We would have to look at the logs to determine that.

Q. Do you know where the driver's log is?

A. Yes, sir.

Q. Where is it?

(Deposition of M. L. Burr.)

A. In the custody of the West Coast Fast Freight, 650 Hanford, Seattle.

Mr. Peterson: I said the following words to Mr. Martin, the attorney:

“Counsel, you do not happen to have the driver’s log here?”

Mr. Martin: No, I do not. As a matter of fact, I asked them to send it up if they had it available, and they may have it in Portland.

Q. (By Mr. Peterson): Did you make entries in the driver’s log of all the stops which you made after you departed from 2500 Northwest 25th Avenue, Portland, Oregon? A. Definitely.

Q. Do you recall at any time after you departed from 2500 Northwest 25th Avenue, Portland, Oregon, stopping for coffee? [169]

A. Would you read that question please, Mr. Reporter?

(Last question read.)

A. I don’t remember the time or the point, but on a trip involving 675 miles I no doubt stopped.

Q. Do you recall whether or not you stopped for coffee at any time before you stopped at Cottage Grove? A. I did not.

Q. Before you came to work do you know what inspection, if any, was made of the truck and the trailers that you refer to?

A. By anyone other than myself?

Q. Yes.

A. I don’t know definitely of any inspection.

(Deposition of M. L. Burr.)

However, West Coast shop records would show that—would reflect what work, if any, or inspection was done.

Q. What color was the truck proper—the truck itself—not the trailers?

A. The tractor, I think we call it fire engine red.

Q. And what color was the first trailer—whatever the number was?

A. They are stainless steel, unpainted.

Q. They would be a stainless steel color, or would you call it a silver color?

A. It is unfinished stainless steel. I believe you would call it silver or metallic.

Q. Do you recall which trailer was in the lead—whether it was 7900 or 7901? [170]

A. I don't recall.

Q. Do you know whether or not the trailers were identical—that is to say, the same size and the same appearance?

A. Yes.

Q. On the front portion of the trailer was there a sign?

A. There was a sign on the upper front portion of each trailer—"West Coast."

Q. And was that printed—that is, in a printed form, or did it appear to be written out in long-hand?

A. It would have the appearance of being written out, or as you say, in longhand.

Q. And do you remember the color of the sign on the truck?

(Deposition of M. L. Burr.)

A. The letters are red, and I believe it is a white background on that particular type of sign.

Q. On the trailers are there certain lights?

A. There are minimum requirements of lights—yes.

Q. Well, I understand that there are minimum requirement of lights, but my question is, on trailer 7900 and on trailer 7901 were there lights?

A. Yes.

Q. Can you say where the lights were?

A. Front, rear and all sides.

Q. And by “front” you mean the front portion of each trailer had certain lights on?

A. Yes.

Q. And where were those lights located on the front? [171]

A. I don't remember if that particular equipment had the cluster lights in the center—in the top center of the equipment or not. It is not a requirement, and on some of the equipment that is ornamental only, but I do know that both trailers had the required lights—the top corners, and both sides.

Q. And were there any lights on the tractor portion itself? A. Yes.

Q. Would you describe where those lights were located on the tractor portion?

A. Two headlights in their normal position, and two cab lights on the front corners—they are amber on the front corners of either side of the cab.

(Deposition of M. L. Burr.)

Q. And when you say 'on either side of the cab,' were they above the level of the windshield?

A. Yes.

Q. Were they at the outermost corner of the tractor?

A. No. They were inset probably 6 or 8 inches from the corners or sides.

Q. Now, where do the lights which you have described on the trailers—where do they receive their electricity from to light them up?

A. From the battery or generator, depending on what state of operation the equipment is in.

Q. Do you hook the lines, or wires running from the trailer to the tractor up when they are hooked together? Do you [172] also have the joint wires when you join the tractor and the trailers?

A. Yes.

Q. Did you personally do that on this tractor and trailers on this night of May 2nd, 1953?

A. I don't remember whether I did it, or whether it was done by the local hostler.

Q. Do you remember who the—you refer to the local hostler?

A. I refer to the local hostler, yes.

Q. What is the name of the local hostler?

A. That is a person in the freight office who ordinarily switches equipment in the yard; hooks up tractors to trailers; spots trailers into the docks, and so on.

Q. Do you know the name of the person who was the local hostler at this terminal—

(Deposition of M. L. Burr.)

A. (Interposing): No.

Q. (Continuing): —May 2nd, 1953?

A. No, sir.

Q. And when you have two trailers coupled together, must you hook on electric wires from one trailer onto the wires of the other trailer, and then the wires of the lead trailer onto the wires of the tractor?

A. That is right. The circuit continues from the tractor clear to the back end of the trailer.

Q. Now, these lights which were on the trailers, do you know the color that they were? [173]

A. Yes.

Q. What color were they?

A. Either red or amber.

Q. Do you recall which? A. Both.

Q. Where were the amber ones located?

A. They are located on the front portion of the equipment, and/or the sides, whichever the case may be, and red faces the rear always.

Q. When you say, "the equipment," do you refer to the tractor or do you refer to the trailer?

A. To the trailers.

Q. Now, the trailers—each one of them had an amber light on the uppermost or the top corners of the trailer, is that right?

A. Would you ask it again?

(Last question read.)

A. That is correct.

(Deposition of M. L. Burr.)

Q. Did each trailer have an amber light at the lower corner of each trailer in the front?

A. On the lower corner in the front?

Q. Yes. A. No.

Q. Were there lights on the sides of the trailer?

A. There were lights on the sides of both trailers.

Q. What color were those? [174]

A. Amber.

Q. Where were they located on the sides?

A. On the top and bottom corners, on both sides.

Q. Before you got on the truck at 2500 Northwest 25th Avenue, Portland, Oregon, on the night of May 2, 1953, did you personally inspect the lights? A. Yes, sir.

Q. Was the motor running at the time that you inspected the lights?

A. It is normal to inspect them in that condition, yes, with the motor running.

Q. Do you recall whether or not you did?

A. I no doubt did.

Q. Well, do you recall whether or not you did?

A. No, sir.

Q. Do you know whether or not anyone else moved the truck before you got into it after it had been loaded for the purpose of carrying cargo to Oakland, California? A. I don't know.

Q. When you did get into it had someone already started it—in other words, was the motor running, or did you, yourself, start it?

A. I started it myself.

Q. And then if you started it yourself, did you turn on the lights? A. Yes. [175]

(Deposition of M. L. Burr.)

Q. And after you turned on the lights did you get out of the cab, or out of the tractor to look at the lights after you turned them on?

A. That is the normal practice. In this particular case I don't remember.

Q. Then is it your testimony that on the night of May 2, 1953, after you started the truck and turned the lights on, you cannot remember whether you got out of the tractor and looked at the lights that were on the trailers?

A. I inspected the equipment. Yes, I got out of the truck.

Q. Is it your testimony that you got out of the truck after you turned the lights on for the purpose of inspecting the lights on the trailers?

A. They had to be on for me to inspect them, so that the answer would be "yes."

Q. Is it your testimony that you did do that?

A. Yes.

Q. Would you tell us whether or not there was anybody present at the time that that was done?

A. I don't recall.

Q. Mr. Burr, as a matter of fact, you don't recall whether or not you actually did that or not, do you, at this time?

A. That I did what?

Q. That you got in the truck—in the tractor, and you started the motor and you turned the lights on, and that you [176] then got out of the tractor and walked around the trailers to inspect the lights. The fact is that you don't know or don't remember

(Deposition of M. L. Burr.)

whether you did that or not, isn't that a fact?

A. Could I give you the normal practice for inspecting equipment in answer to that question?

Q. No. I think that your counsel would advise you that if you do not remember your answer is that you do not remember. To say what the normal thing is does not mean that you did the normal thing. I am simply asking you if you do remember. If you don't remember, it is your duty under your oath to say that you do not remember. If you do remember, then I want to know what the fact is.

A. I don't remember.

Q. So, Mr. Burr, as a matter of fact, you cannot say when you drove the truck away from 2500 Northwest 25th Avenue in Portland, Oregon, or you cannot tell me whether all the lights on the trailers were working or not? Isn't that a fact—that you cannot testify to the fact at this moment whether they were all working, or whether they were not all working?

A. They were all working, or I would never have moved the truck or equipment. The lights on the sides of the equipment can be seen from the mirrors. Their operation can be told from the cab itself. The lights on the back of the trailers were inspected by me before departure.

Q. Now, do I understand you to say that you did turn the [177] lights on, and you got out of the tractor and inspected the lights on the rear of the trailers?

A. Yes.

(Deposition of M. L. Burr.)

Q. Can you tell us the approximate hour that was done?

A. It was done between the times—what times do I refer to—is it 10:40?

(Mr. Martin hands witness statement.)

A. That was done between 10:40 and 11:30.

Q. (By Mr. Peterson) would that show up on your driver's log?

A. The inspection of the lights?

Q. Yes. A. No, sir.

Q. Do you know the name of the person, whether a mechanic or other employee of the West Coast Fast Freight, who coupled together Trailer No. 7900 and Trailer No. 7901 to Tractor No. 3499 on the day of May 2, 1953, or any preceding day?

A. I don't know.

Q. Who normally would do that?

A. The hostler that I referred to earlier.

Q. Whose name you cannot say?

A. That is correct.

Q. Do you know whether or not there was a tachograph on Tractor No. 3499 that was covering the trip from Portland, Oregon, to Oakland, California, on the night—departing [178] on the night of May 2, 1953?

A. There is a tachograph installed in the equipment—is that what you mean?

Q. Yes. And, did it operate on that night?

A. Yes, sir.

Q. Would that accurately record the stops and the speed of Tractor No. 3499 during that trip?

(Deposition of M. L. Burr.)

A. The tachograph would not reflect the speed.

Q. What would it reflect?

A. It would reflect the fluctuations in engine RPM; also, the stops made.

Q. Do you know whether or not the tachograph recorded on Tractor 3499 on that night was kept?

A. I don't know.

Q. Do you know whether or not it was the practice or the custom of West Coast Fast Freight to keep track of recordings?

A. I understand that they retain them for a certain length of time, the limits of which I don't know.

Q. Do you know whether or not that is two weeks or two years?

A. At the present time I don't know.

Q. Can you estimate whether that is weeks or months?

A. No, sir.

Q. Do you know a West Coast Fast Freight driver by the name of Vassar?

A. Vassar?

Q. Yes, sir. [179]

A. No, sir.

Q. I will hand the same document that I previously referred to, that has your signature on it, or what purports to be your signature—I will hand it to you, and it appears to me that Tractor No. 3298 with Trailer 7657 left for Los Angeles at 11:30 p.m. on May 2, 1953, driven by a driver by the name of Vassar. Would that be incorrect in your estimation?

A. What is your question?

(Deposition of M. L. Burr)

Q. What I have related to you, or is that the fact, or do you know?

A. Well, did you state a question?

Q. Yes, I stated——

A. (Interposing): Would you repeat the question?

Q. I stated what I purported to read off the document which you hold in your hand. I will ask the reporter to read the question.

Mr. Martin: He was not there at the time. I do not see how you can ask him a question as to when somebody left.

Mr. Peterson: I will now withdraw the question and rephrase it.

Q. (By Mr. Peterson): Do you know a driver by the name of Vassar? A. No, sir.

Q. Do you know a driver by the name of E. Taylor? A. Yes. [180]

Q. Now, did you see Mr. Taylor—a driver by the name of Taylor on the night of May 2, 1953?

A. I don't recall.

Q. Do you remember Mr. Taylor's first name?

A. I am looking at this sign-out sheet, and I associate him with equipment 5478. It would be Elroy—I believe that that is his name.

Q. Did he have a relief driver on the trip that he made? A. I don't remember.

Q. What appears to be the sign-out signature besides Taylor?

A. It cannot be read. I cannot read it.

Q. Well, it appears to me that it is I. Saghati.

(Deposition of M. L. Burr.)

I don't know whether my pronunciation is correct.
Do you know a driver by that name?

A. No, sir.

Q. Or any similiar name?

A. I would have to study similarities to be sure,
but offhand I would say no.

Q. Do you recall seeing Elroy Taylor on that
evening that I asked you about? A. No, sir.

Q. Do you know what time his truck No. 5478,
left, if you know?

A. I don't know. However, the sign-out sheet
states 9:18 p.m.

Q. 9:18 p.m., would that simply mean that that
is the time [181] that Elroy Taylor reported for
work? A. I would assume so.

Q. So that truck, No. 5478, might have left at
10:00 o'clock or 10:30? A. It could be.

Q. Do you know whether or not that truck had
departed at the time that you came to work at
twenty minutes to eleven? A. I don't recall.

Q. After the equipment, that is Tractor 3499
with these two trailers hooked on, left the terminal
in Portland, that is, 2500 Northwest 25th Avenue,
what route did you take or follow?

A. I went down the water front, across the Ross
Island Bridge, out 99E through Oregon City, and
so on, which is the prescribed route.

Q. Did you make any stops before you arrived
at Oregon City? A. No, sir.

Q. Do you recall whether or not you passed any

(Deposition of M. L. Burr.)

vehicles going in the same direction that you were traveling? A. I don't recall.

Q. Do you recall whether or not you made any stops in Oregon City? A. I did not.

Q. Were the traffic lights operating at the hour that you drove through?

A. What traffic lights? [182]

Q. I will ask you that in this way: Were there any traffic lights operating in Oregon City on the night of May 2, 1953, when you drove through Oregon City with this equipment?

A. If it was not, I would have noticed the malfunctioning of the traffic light in Oregon City, and I am safe in saying that it was in operation.

Q. Do you know whether or not you made a stop in obedience to a traffic control signal which was red? A. I don't remember.

Q. Do you remember going through the City of Salem, Oregon, on that night?

A. I recall no incidents.

Q. Do you recall driving through the City of Salem, Oregon, that night?

A. No, I don't recall.

Q. You don't recall whether you took the truck route or not through Salem?

A. It is compulsory that you do.

Q. I agree with you that it is compulsory that you drive on other than the regular highway for

(Deposition of M. L. Burr.)

through motor traffic, but do you recall whether you did take the truck route, or whether you drove on the regular highway?

A. This is off the record—people cannot understand how routine a trip is. That is my way of my answer.

Q. Mr. Burr, I recongnize that perfectly, and I do not [183] want to embrass you by asking these questions.

A. There is no embarrassment whatsoever.

Mr. Martin: Just answer the question. You went through Salem, didn't you?

The Witness: Naturally.

Mr. Martin: Tell him the facts. That is what he is asking you with reference to that question.

The Witness: Well, actually he asked me if I remembered going through. That has been almost a year ago—nine months—certainly not.

Mr. Peterson: That is all I want.

Q. (By Mr. Peterson): Had you made this run on many other occasions prior to this?

A. Yes; on many occasions.

Q. And did the truck depart the usual—or was this the usual hour for the truck to depart?

A. They depart at any and all hours—twenty-four hours a day.

Q. Were you, yourself, as a truck driver normally making this run to Oakland, California?

A. Yes.

Q. When you made a night run did you normally take your lunch with you? A. No.

(Deposition of M. L. Burr.)

Q. Do you recall on the night of May 2, 1953, where you ate supper? [184]

A. I don't recall.

Q. Do you recall when you ate breakfast?

A. I don't recall.

Q. Do you recall where you ate breakfast?

A. I don't recall.

Q. Do you recall at any time on that run whether you ever stopped for coffee? A. I don't recall.

Q. Do you recall whether at any time you stopped for the purpose of doing any mechanical work except at cottage Grove?

A. The logs would reflect all that.

Q. That is, the driver's log would reflect all that? A. Yes.

Q. And you would have made the entry in there?

A. Yes, sir."

Mr. Peterson: Then I handed the photograph to the reporter and said, "Will you mark this photograph, Mr. Reporter?"

(Thereupon, photograph previously identified in the deposition as Plaintiff's Exhibit A for identification was marked Plaintiff's Exhibit 33 for identification.)

(Reading of deposition continued as follows:)

Q. (By Mr. Peterson): I hand you what has been marked as Plaintiff's Exhibit A, which is a photograph. Do you [185] recognize what appears in that photograph?

(Deposition of M. L. Burr.)

A. That is a photograph, I would say, of Highway 99E at Jefferson Junction.

Q. And as you look at that picture which direction is the camera facing when taking that picture?

A. I would say north.

Q. And do you recognize the sign which appears in the extreme right side of the photograph?

A. I see a sign pointing to Stayton—I assume it to be Oregon—and Jefferson and Scio.

Q. You have driven this Highway 99E on many occasions, have you? A. Yes, sir.

Q. And you recognize this intersection, or this junction—Jefferson Junction from this photograph?

A. I don't recognize the photograph as the Jefferson Junction, but I associate the names—the three names on the sign itself—on the signpost with the Jefferson Junction.

Q. That is to say you are familiar with the junction, aren't you? A. Fairly so.

Q. And you recognize the picture of it here?

A. That could be a composite picture. I would say no, I don't recognize it.

Q. Let me get this straight. When I handed you Plaintiff's [186] Exhibit A, I asked you if you recognized what that was, and you said, "Yes, it is Jefferson Junction."

A. And then I went on to make conditions thereof.

Q. Is it your testimony that you do recognize it, or that you don't recognize it?

(Deposition of M. L. Burr.)

A. It is similiar and somewhat familiar.

Q. Now, do you recall on the morning of May 3, 1953, the hour that you passed that intersection, or arrived at that intersection? A. No, sir.

Q. Now, would your tachograph show the exact number of miles and the exact minute that truck was at Jefferson Junction on that morning?

A. It can be computed—yes.

Q. It can be computed?

A. It can be computed, yes.

Q. It can be computed if you take a similiar—or if you would take the same truck and follow the same route from 2500 Northwest 25th Avenue southbound that you followed that night, making the same stops that you made, you would arrive there at the same moment and you could mathematically determine——

A. (Interposing): I made no stops.

Q. You mean that you never stopped for a stop sign or traffic light all the way from Portland, Oregon to Cottage Grove? [187]

A. I assumed you to mean relief stops or coffee stops.

Q. I did not mean that. I mean stops—when the vehicle comes to a stop. That is what I meant. I did not mean to infer something else.

A. Go ahead.

Q. Can it not be mathematically computed, the precise moment that the tractor which you were driving with the two trailers hooked onto it—the exact moment that it arrived at Jefferson Junction?

(Deposition of M. L. Burr.)

A. It can be computed.

Q. It can be computed on the basis of the tachograph, am I correct? A. That is correct.

Q. I believe you testified that you passed Jefferson Junction at 1:00 o'clock in the morning, or 1:10. Do I correctly remember what you testified?

A. I believe that is the hour that I stated—yes.

Q. You mean to say approximately 1:00 o'clock or ten minutes after 1:00 o'clock but you are not saying that that is the precise moment?

A. No.

Q. But that is your best estimate?

A. That is correct.

Q. At the time that you came to Jefferson Junction do you recall whether you saw any other traffic? [188]

A. I don't recall.

Q. Do you recall at any time after you left Salem, Oregon, whether or not you passed any motor vehicles going in the same direction that your equipment was going? A. I don't recall.

Q. After leaving Salem, Oregon until the time that you made a stop at Cottage Grove, Oregon, do you recall whether or not you ever passed any motor vehicles going in the same direction that you were going? A. I don't recall.

Q. Do you remember the condition of the weather at all on that night?

A. I don't remember.

Q. Do you recall whether or not you passed

(Deposition of M. L. Burr.)

other vehicles after you left Salem, Oregon, going in the opposite direction from the direction in which you were traveling?

A. I don't remember.

Q. Do you recall seeing any other trucks or trailers on the highway proceeding in the same direction as yourself on that night?

A. I don't recall.

Q. I believe you testified that you stayed on the right side of the highway all of the way from Portland, Oregon, to Cottage Grove. Now, did I understand you correctly to say that you did stay on the right side of the highway all of the way? [189]

A. It is customary for good drivers to stay on the right-hand side of the highway, unless, of course, passing other equipment or cars, and I also said that I did not remember whether or not I passed any vehicles.

Q. Then the fact is that you don't remember whether you passed any vehicles going in the same direction that you were going, and, therefore, you cannot remember whether you stayed on the right half of the highway all the way, because if you did pass other vehicles you would be on the left half of the highway isn't that the fact?

A. Mathematically that would be right—geographically, I mean.

Q. I do not mean to be argumentative about it, but you don't remember whether you passed other vehicles or not?

A. Yes, that is correct.

(Deposition of M. L. Burr.)

Q. And, therefore, you don't remember whether you were on the opposite side of the highway?

A. That is correct.

Q. Now, do I understand you to say that at Cottage Grove you inspected the lights on the tractors and trailers? A. That is right.

Q. Now, what did you do to inspect them?

A. At a stop of that nature we do what we call a visual inspection, which consists of a walk around the equipment and visually seeing if all the lights were burning.

Q. Did you look at the connections of all the lights? [190]

A. No, sir.

Q. (Continuing): —at the time that you made the inspection?

A. When I say, "No, sir," I mean it is not customary in an inspection of that sort to check the connections.

Q. Do you remember whether or not at the time that you made your inspection the truck headlights were on? A. I don't remember.

Q. Now, when you turned the front headlights on on this tractor and trailers, did that also turn all of the other lights on?

A. No. The switches are separate.

Q. Will you tell us what are commonly referred to as clearance lights?

A. Clearance lights are the lights which I described as the lights which are on the sides, the front, back and so forth.

(Deposition of M. L. Burr.)

Q. Is it possible for you to have passed a motor vehicle going in the same direction as yourself at Jefferson Junction on that morning and you not now remember it? A. It is possible.

Mr. Peterson: I have no further questions.

Redirect Examination

By Mr. Martin:

Q. Mr. Burr, this Drivers' Sign-out Sheet, under the column, "Time left," with your signature shows the hour of 10:40, and you testified that that was the time that you [191] reported for work and picked up your bills. What did you do between 10:20 and the time you left, at 11:30?

A. That time involved consisted of a thorough inspection of the equipment, and in this case probably it could have included cleaning out or wiping up the equipment, which is quite common at the start of a trip.

Q. What is the standard procedure of drivers, and yourself included, on inspection before you take equipment from the terminal at Portland?

A. It is the practice to thoroughly inspect the equipment—as a matter of fact, it is a company rule, which includes checking the oil; checking all the lights, switches, instruments, running gear, connections, and the brakes are also tested before pulling out; fifth wheel connections, and landing gear.

Q. Well, did you follow the standard procedure of inspection before leaving on this trip at 11:30?

A. Yes.

(Deposition of M. L. Burr.)

Q. On the night of May 2nd? A. Yes.

Q. Counsel asked you a number of questions, whether you were in the truck, or out of it, when the lights were turned on, and whether you inspected the equipment and its lights before you drove the vehicle out of the terminal. Did you inspect the equipment and its lights before you drove the [192] vehicle out of the terminal?

A. Yes.

Q. And you were also asked the question by other counsel as to whether or not you might have passed other cars and you said that you could not remember, and I think I asked you whether it was possible that you might have passed some car at the junction that you could not now definitely remember. My question is this: Did you stay on your right side of the highway at all times when you met any north-bound traffic? A. Yes, sir.

Q. And if you did pass any vehicle at any time it would have been on an occasion when there was no northbound traffic coming towards you?

Mr. Peterson: I object to that as leading, your Honor.

Q. (By Mr. Martin): Well, just state what you did, if you did have occasion to pass a vehicle.

A. If I had occasion to pass a vehicle I would have made a pass at a time when there was no north-bound vehicle or equipment within a dangerous or impassable distance, which is a common safety measure.

Mr. Martin: That is all.

(Deposition of M. L. Burr.)

Recross-Examination

By Mr. Peterson:

Q. But the fact is that you don't remember whether you ever passed any cars going in the same direction that you were going after you left Portland, Oregon, until you arrived at [193] Cottage Grove. Isn't that the fact?

A. That is the fact.

Mr. Gearin: Now, we object to the rest of this, your Honor, as being entirely irrelevant, immaterial, improper, prejudicial, and generally improper.

Mr. Peterson: I think it is utterly immaterial, your Honor, because it relates to the signing of the deposition.

The Court: That is all. We will take a recess.

(Jury retires for recess.)

Mr. Gearin: At this time, your Honor, since plaintiff has rested and we have had the benefit of the testimony of Mr. Burr, I move on behalf of Mr. Burr alone for an order directing the jury to return a verdict in his favor and against plaintiff on the ground and for the reason that while there is testimony in the record that there was a West Coast Fast Freight truck there, if creditable evidence, there is no testimony at all that Mr. Burr was the driver of the truck or that there were no other West Coast Fast Freight trucks there at the same time,

and I refer to the Drivers' Sign-out Sheets which indicate that there were more drivers. Mr. Vassar was there; maybe somebody else. There is no evidence, creditable or otherwise, to tie in Mr. Burr with this particular operation, and I think he should be granted a directed verdict on that basis alone. [194]

Mr. Peterson: Your Honor, I think the motion for a directed verdict is improper before defendant finishes his case, and, secondly, I think it is clear he was there at the time. According to his own testimony, he was there at 1:00 or 1:10 although he did not say it was a precise moment. He was there at 1:00 or 1:10 according to his testimony.

The Court: There is no evidence that another West Coast Fast Freight truck was not there at one o'clock, precisely at that time. There is no one else who saw this man. There is no evidence that no other trucks were operating at the same time.

Mr. Peterson: The sign-out sheet, I think, is rather clear about that, your Honor. I think it would be an invasion of the jury's province not to let the jury determine the facts.

Mr. Gearin: Your Honor, it does not reflect the time he left but reflects the time he went to work.

The Court: What about the tachograph? Are you going to have any other evidence about where that is?

Mr. Gearin: No, your Honor, I have made considerable effort to obtain the tachograph before the deposition of Mr. Burr and since, and I have been informed that those logs are all destroyed ten days following unless there has been an accident.

The Court: Are you going to have any evidence to that effect?

Mr. Gearin: No, your Honor, we just cannot find it, [195] and I have not got it. It has been destroyed. We cannot find it.

The Court: Are you going to explain the absence with an official from the company? That is what I am asking you.

Mr. Gearin: No, your Honor, they have to prove he was there. We do not have to prove he was not there. No inferences can be drawn by our lack of evidence, your Honor, because under the federal discovery rules they have as much access to that as we do. In the State Court it might be different.

The Court: You say that if he argues that you should have brought the tachograph here that that is an improper argument?

Mr. Gearin: As I understand the rule here in Federal Court, you cannot comment on the failure to produce testimony the same way I could not argue why didn't they produce Mr. Walker as a witness. I would not be entitled to ask that type of question to the jury or make that argument.

Mr. Peterson: Mr. Swan testified that the records were kept but he did not know where they were; that they would be transferred from Portland to Oakland, California, he thought. The defendant said that the driver's log was in Seattle, Washington, on the date of his deposition, February, 1954.

The Court: Mr. Swan testified that that is not in [196] his department. He does not know anything about that.

Mr. Gearin: They could have taken depositions of the officials if they wanted to produce it, your Honor. I can only give at this time to the Court my personal assurance that I have done everything I can to obtain their records.

Mr. Peterson: I have filed herein a notice to produce.

The Court: I am going to permit you to explain, if you desire, the steps that you went through in trying to obtain the tachograph.

Mr. Gearin: Thank you, your Honor.

The Court: To explain its absence, and then he can make any argument he wants on that. At the conclusion of the case you may make a motion on behalf of Mr. Burr. I do not know about that. How would you be prejudiced if I dismissed him out of the case?

Mr. Peterson: I think it would render the verdict of the jury speculative then as to the proof of the other trucks because I do not think that we have proved that other trucks were in the area, and it would leave it purely speculative as to the other trucks. I think we have proven facts from which a jury may infer that he was the driver, on the basis of his own admissions, he being there at one o'clock.

(Discussion between Court and Counsel.)

The Court: I am going to leave it up to you, Mr. Peterson. [197] You make up your mind as to how you want that done. You have the statement that he was around there at one o'clock, between 1:00 and

1:10. Is that sufficient evidence to hold him? I am going to give you that responsibility.

(Thereupon, the jury returned from recess and the following proceedings were had.)

Mr. Gearin: I would like at this time, your Honor, to introduce in evidence pre-trial Exhibit No. 27 which is a certified photostatic copy of the complaint in the Circuit Court of Multnomah County, State of Oregon, entitled "Dorothy Walker vs. Janice Holman, et al. And photographs being Nos. 26-A to E, inclusive.

The Court: What number is that complaint?

Mr. Gearin: That is 27, indicated as No. 7 in the copy of the pre-trial order which your Honor has.

The Court: Very well.

Mr. Gearin: And the photographs Nos. 26-A to E which are indicated as No. 6. The numbers were changed to accommodate the court reporter, your Honor.

The Court: Is there any objection?

Mr. Peterson: Might inquire the purpose of the first exhibit referred to?

Mr. Gearin: You mean the complaint?

Mr. Peterson: Yes.

Mr. Gearin: Do you want me to state that now?

Mr. Peterson: I would like to know the general purpose. [198]

Mr. Gearin: The purpose of it is primarily for the purpose of impeachment, your Honor. It shows that on August 27th there was filed in the State

Court a complaint which alleges that at a point three and a half months after the accident at Jake's that the plaintiff made a claim of permanent injuries to her back and permanent aggravation of a pulmonary condition of tuberculosis which is in direct conflict to her testimony under oath here, and it shows that she there was previously damaged in the sum of \$25,000, practically the same injuries which she is now seeking to recover from against us. I think it is material for that purpose.

Mr. Peterson: Your Honor, I assume that the witness has admitted everything counsel has stated, that a complaint was filed, and it was settled, and the reasons for it. I do not think it is proper.

The Court: Objection overruled. It may be admitted.

(Document, phostatic copy of complaint, previously marked Defendants' Exhibit No. 27 for identification, received in evidence.) [199]

Mr. Gearin: Call Mr. Lehr.

DUANE W. LEHR

a witness called in behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Where do you live, Mr. Lehr?

A. 3325 Abraham Avenue, Salem, Oregon.

Q. What is your occupation?

(Testimony of Duane W. Lehr.)

A. Patrolman, City of Salem Police Department.

Q. What was your occupation May 3, 1953?

A. Deputy Sheriff, Marion County, Oregon.

Q. Did you on the date of May 3, 1953, arrive at the scene of an accident at South Jefferson Junction and U. S. Highway 99E? A. I did.

Q. What did you see when you arrived?

A. The first thing that was brought to my attention was the fact that the L.A.-Stattle truck was parked on the right-hand side facing north with its flares out.

Q. Did you see a passenger car?

A. Pardon?

Q. Did you see a passenger car there somewhere off the highway?

A. Did I see one there? One, that was all. [200]

Q. What did you do?

A. I got out of this automobile I was riding in with a friend of mine. We were coming back from Lebanon. We got out, and I saw a lady that was later identified as Dorothy Walker lying on the east shoulder.

Q. Did you talk to Mrs. Walker at that time?

A. I did.

Q. Did she say anything as to how she got to where she was?

Mr. Peterson: Objected to as leading and improper in form.

The Court: I will sustain the objection. Ask the question over again .

(Testimony of Duane W. Lehr.)

Q. (By Mr. Gearin): Did you have any conversation with Mrs. Walker? A. I did.

Q. What was the subject of your conversation with her?

A. I asked her what happened, and she said she was run off the road by a truck.

Q. What is the fact as to whether or not you made any inquiries of Mrs. Walker as to her knowledge concerning the identity of that truck?

Mr. Peterson: Objected to as leading, your Honor.

The Court: Objection overruled.

The Witness: I asked her on two different occasions repeatedly what—if she could identify the truck so we could radio ahead in some other way. Of course, I was not [201] in a radio equipped car, but we could have made contact immediately to stop a truck that was involved, and I asked her what truck it was. She didn't know. I asked her again to describe the truck, She said, "All I know it had silver on it."

Q. Was there anybody else that had been with her at that time? A. Pardon.

Q. Was there anybody that had been in the car with her in this vicinity that night? A. Yes.

Q. Do you recognize the lady sitting in the front row in the back there? A. By name, yes.

Q. Did you have a conversation with her?

A. I did.

Q. What did she tell you?

(Testimony of Duane W. Lehr.)

A. She told me it happened so fast she didn't know what happened.

Mr. Gearin: You may inquire.

Cross-Examination

By Mr. Peterson:

Q. What time did you arrive, officer?

A. What time did I arrive? By the time element I would say it was approximately a quarter to two or two o'clock on May 3rd. [202]

Q. A quarter to two or two o'clock?

A. Between that time, yes.

Q. Did you make any notations at the time as to the time that you did arrive? A. I did.

Q. You did? A. Yes.

Q. You have them with you?

A. No, I do not.

Q. Were you in uniform at the time?

A. Pardon?

Q. Were you in uniform at the time?

A. No, I was not.

Q. You were riding with a friend?

A. Yes.

Q. And coming from Albany to Salem?

A. I was coming from Lebanon to Salem.

Q. Lebanon. I wonder if the aerial photographs might be shown to the witness in order that we might place the direction of the truck that he has referred to. Mr. Lehr, might I ask the numbers of those two exhibits. Would you advice me?

(Testimony of Duane W. Lehr.)

A. This is No. 11.

Q. Do you recognize the directions there?

A. According to the aerial photograph, I would say this [203] is north, south, east and west. (Indicating.)

Q. Could you mark it on there, if you recognize it, which the directions are? Turn it over on the back and mark it whatever the directions are if you recognize it.

A. It is similar although I have never seen an aerial photograph of the Jefferson Junction. It is, I would assume is similar to the clover leaf at Jefferson Junction.

The Court: Do you know what the directions are? Do you know what north is on that?

Mr. Peterson: Yes, I do.

The Witness: Let us see, according to this I imagine north is over here; is that correct?

Q. I cannot see the photograph. The jury cannot either.

(Exhibit displayed to the jury.)

Q. Referring to Exhibit No. 11, do you recognize first the clover leaf there? That is a circle highway? A. Yes.

Q. Then which direction does it appear to you to run? Examine the top of the photograph.

A. Well, that appears to be west.

Q. I think you are incorrect. It is east. The highway runs in that direction, and the photograph was taken looking east.

(Testimony of Duane W. Lehr.)

A. As I stated, I am not familiar with aerial photography in that area. [204]

Q. Well then, perhaps this other one would be better for you then, No. 12. Can you tell us which direction that is looking?

The Court: We are not going into that. You tell him which direction it is because the man never saw the aerial photograph. You are not quizzing him about it. You tell him what the directions are there.

Mr. Peterson: Very well.

Q. May I state to you, Mr. Lehr, that on No. 12—

Mr. Gearin: Mr. Peterson, may I make this suggestion? Why don't you put the Portland and the Albany directions on there. I think that may be easier because the highway may not run a true direction.

Mr. Peterson: I will mark down at the bottom with an arrow "to Albany" and at the top an arrow "to Portland." Is that satisfactory?

Mr. Gearin: Fine.

Mr. Peterson: I will do the same as to the other one.

Q. Now then, if you have these directions fixed in your mind, would you hold it up, hold up No. 11 so that the jury could see it. Where was the truck that you referred to that was stopped there?

A. The truck that I have reference to would be on the right-hand side parked approximately in this vicinity (indicating). [205]

(Testimony of Duane W. Lehr.)

Q. Did you see an automobile that was over the bank?

A. At which time? When I arrived or later?

Q. When you arrived.

A. When I arrived, no.

Q. Did you see an automobile over the bank at a later time? A. I did.

Q. Did you see any tracks where the car had gone over the bank?

A. At that particular time my first interest was injuries and so forth, and I was not making any—I was making a preliminary investigation for the injuries only.

Q. Later did you see tracks that lead off the highway down over the bank? A. Yes.

Q. Mr. Lehr, did you make any notations of the conversation that you held with Mrs. Walker here on my right, on that morning? A. I did.

Q. You did make a notation? A. I did.

Q. Do you have your notation with you?

A. I have not.

Q. You have not? A. No.

Q. Have you refreshed your recollection from that? A. Have I? [206]

Q. Yes. A. Yes.

Q. Mr. Lehr, what was her condition? Would you tell the jury what her condition was as you observed it?

A. Her condition when I observed her?

Q. Yes.

(Testimony of Duane W. Lehr.)

A. When I saw Mrs. Walker she was laying with her head to the north, feet to the south, on the east side of the shoulder, and her condition as I observed at the time, well, that was all it was, I would say.

Q. Did you observe any blood?

A. I did not.

Q. Did you observe any vomitus?

A. I did not.

Q. Did you observe the condition of her clothing?
A. I did.

Q. What kind of clothing did she have on?

A. Dark clothing.

Q. Any dirt or mud or other debris on it?

A. There was dirt, naturally, from the supposed climb up this hill that she said she made.

Q. Was there a blanket under her head?

A. Not at the time. I put one there.

Q. Did you identify yourself as being a police officer?
A. I did. [207]

Q. You told Mrs. Walker that at that time?

A. I did.

Q. Where was Miss Renfro?

A. Miss Renfro was laying down over the hill.

Q. How far in distance was that?

A. I would say approximately 20 feet or something like that.

Q. Twenty feet? A. Yes.

Q. That is down the bank?

A. Down the embankment, yes.

Q. What was her condition as you observed it?

(Testimony of Duane W. Lehr.)

A. Her condition, her head was—she was laying, oh, southwest we will say on this, the side of the embankment right at the bottom of the bank.

Q. Mr. Lehr, do I understand you to say that you asked Mrs. Walker what happened, and she said that she was forced off the highway by a truck?

A. That is right.

Q. Did you ask her what did the truck look like; is that correct?

A. That is right.

Q. Did she not tell you that it was a silver truck?

A. She said it was a silver truck—silver colored truck and that it had silver on it. That was all.

Q. Didn't you at that time say to her, "Can't you tell us more about the truck," and she said, "I am hurt. I do not [208] want to tell you any more about it," or words to that effect?

A. No.

Mr. Peterson: No further questions.

Mr. Gearin: Thank you, Mr. Lehr. That is all.

(Witness excused.) [209]

WALDEN WADDLE

a witness produced in behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Where do you live, Mr. Waddle?

A. West Fir, Oregon.

Q. Where were you living in May, 1953?

A. 1125 East Seventh, Albany, Oregon.

(Testimony of Walden Waddle.)

Q. By whom were you employed on that date?

A. The A. A. Towing Company, Albany, Oregon.

Q. Were you a tow truck operator?

A. Yes.

Q. Did you go out to the scene of an accident in the early morning hours of May 3, 1953, at South Jefferson Junction? A. I did.

Q. What did you see with reference to an automobile there?

A. A Buick car down off the road on the east side of the junction.

Q. What was your purpose in going out there?

A. To take the car to Albany.

Q. Had you been given any information with regard to the condition of the car before that?

A. No.

Q. What was the condition of the car when you saw it? [210]

A. It was sitting on the bottom of the grade with two wheels on the side of the grade giving the car somewhat of a tilt. It had not tipped. The doors were closed; lights were off. The car had been taken care of by someone.

Q. Where were the keys?

A. They had been removed from the switch, and I found them in the car.

Q. What did you do to the car?

A. Due to the muddy condition of the ground, I could not drive the tow truck to the car so I inspected the car and found that I could drive it, so I drove it out near enough to the place I could get

(Testimony of Walden Waddle.)

the tow truck so that I could draw the car across the mud and hook up to the tow truck.

Q. Did you observe any blood in the front seat of the car? A. I did not.

Q. Did you get in behind the wheel?

A. I did.

Q. Was the car in drivable condition?

A. I drove it.

Q. Did you observe any damage to the car?

A. There was slight body damage. I found no mechanical damage.

Q. Then after you got it out of the mud what did you do with the car?

A. I took the car onto the south branch of the road running [211] from Jefferson towards Albany, and I raised it up, crawled underneath and checked the automatic transmission to see that there would be no harm done in towing it; found nothing wrong so I drove on to Albany with the car.

Q. Did you tow it in? A. Yes.

Q. Why did you tow it in?

A. I was there with the tow truck. I was alone. I had to tow one outfit to get both in.

Q. Will you describe the body damage that you saw to the car?

A. There was slight damage to the front bumper, a broken section on the lower part of the grille, and a crushed in place under one door.

Mr. Gearin: You may inquire.

(Testimony of Walden Waddle.)

Cross-Examination

By Mr. Peterson:

Q. How far down was this car from the level of the highway?

A. The grade there is a little over 20 feet.

Q. That would be 20 feet down from the level?

A. The vertical height.

Q. From the front of the car to the top of the highway would be a distance of 20 feet; is that correct?

A. Straight down, if you draw a line straight out from the top of the highway, dropped it down, is the distance I mean.

Q. A fall of 20 feet? [212] A. Yes.

Q. But if you took an angle, what is the distance there? A. Oh, I would say 29 feet.

Mr. Peterson: May those pictures be shown to the witness, the small ones?

(Photographs presented to the witness.)

Q. (By Mr. Peterson): Handing you those small photographs, I believe they are numbered 1-A to J, inclusive, I will ask you if that appears to be the spot where the accident occurred?

A. In that first one I see no marks to recognize.

Mr. Gearin: What is the number on the back, Mr. Waddle?

The Witness: 1-G. 1-B is in the vicinity of the accident.

(Testimony of Walden Waddle.)

The Court: What is it that you want to know, Mr. Peterson?

Mr. Peterson: I want to know if he saw any car tracks immediately south of the highway sign—when you were there.

The Witness: Down the grade where the car traveled?

Q. Wherever off the highway and down the grade.

A. I did not work on top of the grade.

Q. You were not on top of the grade?

A. No.

Q. Were there tracks or were there not tracks when you were there?

Mr. Gearin: He said he was not there.

The Witness: I was not on top of the [213] grade.

Q. (By Mr. Peterson): You did not go on top of the grade? A. I did not.

Q. Your tow truck was down in the bank in the field or cut or ditch or whatever you want to call it?

A. No, I had to drive the car from where it was out to the place I could get the tow truck, get it close enough to the tow truck for my cables to reach.

Q. Can you tell the jury how far that car was from the center of the highway which goes east at that point?

A. It was not so far north as this highway sign shows here (indicating).

(Testimony of Walden Waddle.)

Q. Tell the jury about how far that is in distance?

A. No, I would rather not guess at the distance.

Q. Less than 100 feet?

A. It was more than 100 feet from the junction to where the car was.

Q. Would you say it is less than 200 feet?

A. I would not like to make a statement as to the exact distance.

Q. Mr. Waddle, when you got there the car was nosed down into the rocks; isn't that right?

A. No.

Q. What was it nosed down into?

A. It was not nosed down.

Q. Could you tell what had stopped its forward progress?

A. The brakes and wheels, the sliding of the wheels. [214]

Q. There was damage to the front part?

A. Slight damage.

Q. There was damage to the grille, to the front bumper?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Did you say one fender?

A. Under one door.

Q. Under one door. Was there an indentation or a bent place?

A. Yes.

Q. Was that rather extensive?

A. No.

Q. Was the bank rocky?

A. Not very many rocks there. There was some small rock.

(Testimony of Walden Waddle.)

Q. You were behind the wheel, were you?

A. Of the Buick?

Q. Yes. A. I drove it.

Q. Was the steering wheel bent?

A. I did not observe that it was.

Mr. Peterson: No further questions.

Mr. Gearin: That is all, sir.

(Witness excused.) [215]

A. C. PAYNE

a witness produced in behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Payne, where do you live?

A. Eugene, Oregon.

Q. What is your occupation?

A. Truck service business.

Q. Do you have one of those big truck service lots on the highway down there? A. I do.

Q. What highway is that?

A. It is on Highway 99 East.

Q. Do you service all trucks or trucks of a particular line?

A. All kinds of trucks, yes.

Q. Do you service all of the trucks of West Coast Fast Freight? A. I do.

Q. North and southbound? A. I do, yes.

Q. Do all of those pass through Eugene?

(Testimony of A. C. Payne.)

A. Yes, they do.

Q. Past your station? A. They do. [216]

Q. Have you checked your records of May 3, 1953, to determine the existence of any records indicating work performed to any loading equipment of West Coast Fast Freight? A. I have.

Q. Will you tell the jury the results of your search?

A. I couldn't find anything at all on any piece of equipment in that twenty-four hours.

Mr. Gearin: You may inquire.

Cross-Examination

By Mr. Peterson:

Q. Are you a truck mechanic yourself, Mr. Payne? A. No, I operate the place.

Q. You operate, you supervise your place?

A. Yes.

Q. Have you been a truck mechanic?

A. I have.

Q. Have you been a truck driver?

A. I have.

Q. Are you familiar with the kind of rigs or tractors and trailers operated by the West Coast Fast Freight? A. I am.

Q. Are they all uniform in size?

A. Very nearly, yes.

Q. Are they uniform in color?

A. Yes. [217]

(Testimony of A. C. Payne.)

Q. What color is that?

A. Red with aluminum trailers.

Q. With aluminum trailers? A. Yes.

Q. Are there any signs on them? A. Yes.

Q. What are the signs?

A. "West Coast" across the front and across the back of the box.

Q. Mr. Payne, did I understand you to say that you had checked the records at your Eugene service department? A. I have.

Q. Do you still service the trucks of West Coast Fast Freight? A. I do.

Q. Did any trucks stop there the preceding day?

A. I don't know.

Q. Or the day after?

A. I don't know.

Q. Did any trucks stop there on May 2nd or 3rd, the night of this accident?

A. On May 3rd, yes.

Q. What time did they stop?

A. I don't keep any record of time.

Q. Do you know whether it would be in the morning, daylight hours, or darkness?

A. No, I do not. [218]

Q. Do you know whether or not there is a separate switch on—whether the truck driver can switch off the clearance lights on the kind of rigs on West Coast Fast Freight? A. No.

Mr. Gearin: I object to that. It must be tied into this particular equipment, and we had a set of doubles or a train.

(Testimony of A. C. Payne.)

The Court: I think it is going far beyond the direct examination. The only questions asked this witness on direct examination were about the records. If you want to inquire about that, it is satisfactory.

Q. (By Mr. Peterson): When you say that you checked the records did I understand you correctly to say that you checked the records to find out if there was any wiring service or electrical service rendered? A. That is right, yes.

Q. But there may have been other kind of work but not wiring?

A. There was to the fuel and oil.

Mr. Gearin: I did not hear that last.

The Witness: There was fuel and oil on the——

Q. (By Mr. Peterson): Do you know whether or not you furnished fuel and oil to the tractor pulling trailers No. 7900 and 7901 that night?

A. I do not.

Mr. Peterson: No other questions. [219]

Mr. Gearin: That is all. Thank you.

(Witness excused.) [220]

WILLIAM T. EWING

a witness produced in behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gearin:

Q. Mr. Ewing, what was your occupation in May, 1953?

A. Oregon State Police Officer.

Q. I understand you are in the insurance business now? A. Yes, I am.

Q. On that date did you go out to the scene of an accident on South Jefferson Junction in the early morning hours? A. Yes, I did.

Q. How did you hear about it?

A. Well, I was gasing up my patrol car at the Albany shops, which is close to Highway 99, and an L.A.-Seattle truck stopped out on the highway, and the driver got out and told me there was a car over the bank.

Q. What kind of a truck was that? Can you describe that? Was that a big truck or a small truck? A. The L.A.-Seattle?

Q. Yes.

A. It was a truck trailer cab-over.

Q. Was it a big rig? A. Yes.

Q. What was its color? Was it a light color or a dark [221] color?

A. The truck is green. The cab is green, and the box was silver.

Q. Did you go out to the scene where you had been told there had been an accident?

(Testimony of William T. Ewing.)

A. Yes, I did.

Q. You were familiar, you had been, had patrolled that night, had you? A. Yes.

Q. For how long a period of time?

A. I started my patrol at 5:00 p.m., and it was to last until 2:00 a.m.

Q. When you were gasing up were you at the end of your line?

A. Yes, it was 1:50.

Q. What highway did you patrol?

A. 99 South out of Albany.

Q. At any time while you were on patrol that night did you observe any truck with improper clearance lights or other lights? A. No.

Q. What would you have done had you observed a truck with improper clearance lights?

A. Well, I would have stopped the truck.

Q. Did you stop any trucks that night?

A. Not with lights, if I remember [222] correctly.

Q. How long a period of time had you been on patrol on Highway 99?

A. Previous to this date?

Q. Yes, what I am getting at is, was this a new assignment for you?

A. About one month I had been on there.

Q. What were your hours?

A. Five p.m. to two a.m.

Q. Can you tell us generally, and briefly if you will, please, Mr. Ewing, the number of big trucks

(Testimony of William T. Ewing.)

that are on the highway in that stretch during those hours?

A. I couldn't begin to estimate the number. There are lots of them.

Q. You know what we talk about when we say the box; that is the trailer. Do you frequently or do you infrequently see aluminum-colored boxes or trailers on highways?

A. Most always they are aluminum, big rigs.

Q. I will ask you what is the fact as to the prominence of red as being a color that is quite commonly found on a tractor part of heavy trucks

A. There are several different companies who have red colored tractors.

Q. On this night can you tell us what the weather was?

A. The pavement was dry, and it was cloudy.

Q. Have you seen West Coast Fast Freight trucks on that [223] highway at night?

A. Yes, many times.

Q. I will ask you, officer, and I want you to wait a moment if you will, please, before you answer. I will ask you if in the vicinity of South Jefferson Junction on an overcast night, if it is possible to see the words "West Coast" on the front of the trailer of one of our rigs unless the same is illuminated by lights on the cab?

Mr. Peterson: I object to that.

The Court: You have not shown any special competence of this person to render that opinion.

Q. (By Mr. Gearin): Have you observed our trucks at night? A. Yes.

(Testimony of William T. Ewing.)

Q. Have you seen the words "West Coast" on the front of the trailer when the sign has not been illuminated by a light on the cab?

A. Not unless I would be absolutely looking for it.

Mr. Peterson: I move to strike it, your Honor.

The Court: Have you made any tests yourself to determine whether you can see the words "West Coast" on the front of the box when you are driving in the opposite direction?

The Witness: I might explain that this way. There has been occasion when we would receive a call on the radio to stop a West Coast truck and advise him that he has left his bills of lading or something of that kind at his station, and at night-time when you see a truck coming, as it gets near [224] your headlights hit it. You look up to see if it was a West Coast truck, and I have done that.

The Court: What do you mean? Would you have to put your head forward towards the windshield to look up?

The Witness: Yes.

The Court: If you are sitting in the regular position you have not been able to see it?

The Witness: Yes; correct.

The Court: What kind of a car were you driving?

The Witness: 1952 Ford.

Q. (By Mr. Gearin): Do you recognize this lady who is sitting here at the counsel table?

(Testimony of William T. Ewing.)

A. Only by name.

Q. Did you have a talk with her when you got out there? A. I inquired——

Q. You just answer the question yes or no.

A. Yes, pardon me.

Q. Did you talk to her at any other place?

A. Yes.

Q. Other than at the scene of the accident?

A. Yes, I did.

Q. Where was that?

A. The Albany General Hospital.

Q. What was her condition, physical condition, with regard to her being rational or not at the time you talked to her out at the scene on the highway and at the hospital? [225]

A. I found her to be rational.

Q. What is the fact as to whether or not she had the appearance of being in full possession of her mental faculties?

A. I don't understand that question.

Q. Did she appear to know what was going on?

A. Yes, she did.

Q. Will you relate the conversations that you had with Mrs. Walker both at the scene of the accident and at the hospital?

The Court: First take the scene of the accident.

The Witness: At the scene I inquired briefly as to her injuries, if there were any broken bones, lacerations, anything where I could have given first aid, and didn't find or observe any physical disabili-

(Testimony of William T. Ewing.)

ties there. At the hospital I inquired as to the description of the truck, of Mrs. Walker.

Q. What did she tell you?

A. She told me it was a red truck.

Q. Did you question her about the identity of the truck? A. Yes, I did.

Q. You tell the jury what you said to her and what she said to you.

A. I told her there were many red trucks on the road and elaborated quite a lot on different types of trucks and different companies who operated red trucks to try to determine the exact company involved.

Q. What did she say? [226]

A. All she could say was that it was a red truck, and didn't help me any more on that.

Mr. Gearin: You may inquire.

Cross-Examination

By Mr. Peterson:

Q. Mr. Ewing, by whom are you presently employed?

A. The Oregon Automobile Insurance Company.

Q. In what capacity? A. Investigator.

Q. That is, you investigate accidents?

A. Yes.

Q. Mr. Ewing, when were your services terminated with the Oregon State Police?

A. September 14, 1954.

Q. Mr. Ewing, you did not make a report of your investigation of this accident, did you?

(Testimony of William T. Ewing.)

A. No.

Q. Under your duties as a state policeman, are you not required to make a report of accidents that you investigate? A. Not always.

Q. Who was your partner at the time that you investigated this accident?

A. There was no other patrolman in the car with me.

Q. Did you meet another state policeman at the scene? A. Yes.

Q. What was his name? [227]

A. Jim Hamer.

Q. Where does Mr. Hamer live?

A. In Salem.

Q. Did Mr. Hamer make a report?

A. I don't believe so.

Q. Mr. Ewing, did you—when you arrived at the scene did you see Mr. Duane Lehr?

A. Yes, I did.

Q. What time did you arrive?

A. 2:05 a.m.

Q. At 2:05 a.m.? A. Yes.

Q. You were gasing up in Albany when, you say, a L. A.-Seattle truck driver told you that there was a car over the bank; is that correct?

A. Yes, it is.

Q. Did the truck driver tell you he had seen the lights of the car over the bank?

A. I don't remember whether he said that or not.

Q. Mr. Ewing, that L. A.-Seattle truck was green in color? A. Yes.

(Testimony of William T. Ewing.)

Q. At five minutes after two you were then off duty, were you? A. No. [228]

Q. Well, your shift was from five o'clock at night until two in the morning; is that right?

A. Yes.

Q. So that at five minutes after two you were off duty? A. No.

Q. The allotted time for you to work expired at two o'clock?

A. For that particular patrol.

Q. For that particular patrol. Now, Mr. Ewing, when you arrived at the scene you saw Dorothy Walker. Where was she at that time?

A. Laying on the shoulder.

Q. What was her physical appearance?

A. Well, I don't remember, but what do you mean by physical appearance?

Q. Can you tell us how she was dressed?

A. No, I couldn't.

Q. Could you tell us whether there was mud on her clothing? A. No.

Q. Can you tell us whether or not there was vomitus on her clothing?

A. I did not see any vomiting.

Q. Can you tell us whether or not there was blood on her clothing?

A. I did not see any blood.

Q. Did you look for it? [229] A. Yes.

Q. Now, Mr. Ewing, do I understand that you had a conversation with her at that time?

A. Very briefly.

(Testimony of William T. Ewing.)

Q. Did you ask her what kind of a truck it was or what happened? A. Not at that time.

Q. Did she appear to be in pain?

A. I don't remember.

Q. Where was the other lady?

A. She was laying at the bottom of the hill. That was down——

Q. You also went down to see her?

A. Yes, I did.

Q. Did you have a conversation with her at that time? A. Yes.

Q. Now, then, you had another conversation over at the Albany General Hospital? A. Yes.

Q. What time did you arrive there?

A. Approximately 3:00 a.m., maybe 3:15.

Q. At that time you had a further conversation with Dorothy Walker? A. Yes, I did.

Q. Was she on a stretcher? A. Yes. [230]

Q. Was Emily Renfro also on a stretcher?

A. Yes, she was.

Q. Were they both in that hospital room?

A. The emergency room.

Q. The emergency ward? A. Yes.

Q. How far apart were the two stretchers?

A. Well, as I remember, they were right together, very close.

Q. Who else was in the room at the time you had a conversation?

A. At different times there would be a nurse. There was two nurses, I believe at different times, and Dr. Bain most of the time.

(Testimony of William T. Ewing.)

Q. Mr. Ewing, at that time and place while Dorothy Walker was lying on a stretcher and Emily Renfro was lying on an adjacent stretcher just a few feet apart in the same room did you ever at that time ask Dorothy Walker what truck it was?

A. Yes, I did.

Q. Did she not say to you, "It was a West Coast truck, and it had a red cab and a silver trailer, and if you will hurry you can catch it?" Did she not ask you that? A. No.

Q. And at that time and place did you not say to her, "Well, we have to be sure. There are other companies that have similar trucks." Do you recall saying that? A. No, I do not. [231]

Q. Do you recall saying to her, "We have got to be sure. Are you sure it isn't——?"

Mr. Gearin: We object to this, your Honor. Proper foundation for impeachment has not been laid.

The Court: Go ahead.

Q. (By Mr. Peterson): Did you not at that time and place say, "Are you sure it was not an Exley truck?"

A. No, I don't remember saying that.

Q. At that time you were familiar with the Exley truck line; were you not? A. Very much.

Q. Do I understand you to say that you do not recall saying that or you didn't say it?

A. What question was that?

Q. You said to Dorothy Walker, "Are you sure it was not an Exley truck?"

(Testimony of William T. Ewing.)

A. I don't remember saying that.

Q. You don't remember saying that?

A. No.

Q. You are not saying that you did not say it?

A. No.

Q. Did she not say to you then, "No, it was a West Coast truck"? Do you recall her saying that to you? A. No.

Q. You are not saying she did not say it, are you? [232]

A. I don't remember her saying it. No, she didn't say it to me.

Q. You are saying now that she did not say it?

A. Yes.

Q. And not that you do not remember whether she said it?

The Court: He has answered the question.

Mr. Peterson: No further questions.

Mr. Gearin: That is all.

(Witness excused.)

Mr. Gearin: Defendants and each of them rest, your Honor. [233]

DOROTHY S. WALKER

recalled for rebuttal testimony, testified as follows:

Direct Examination

By Mr. Peterson:

Q. Mrs. Walker, did you recognize this gentleman who last testified here, William T. Ewing?

A. I don't recognize his face, no. I know that he was an officer that was at the scene of the accident. He is familiar. I would not have been able to pick him out of a crowd.

Q. Did you recognize the other gentleman who has been identified and calls himself Duane Lehr?

A. No, I don't recall Mr. Lehr.

Q. Did someone put a blanket under your head at the scene of the accident? A. Yes, sir.

Q. Where were you lying at that time?

A. Lying beside the road.

Q. Would you relate what conversation, if any, was held at that time, what questions were asked you by this person and what your answers were to him?

Mr. Gearin: We will object to "him," your Honor; entirely self-serving what she said to someone, and undescribed person at the scene of the accident.

The Court: Objection sustained.

Q. (By Mr. Peterson): Did anyone identify themselves as [234] being a deputy sheriff at the scene of the accident?

A. No, if—may I refer to Mr. Lehr's testimony?

Mr. Peterson: The Court has said you may not.

(Testimony of Dorothy S. Walker.)

A. Oh, if anyone did I did not understand it. I do not think he did: I could say what——

The Court: That is all. Objection sustained. There is no question about it now.

Q. (By Mr. Peterson): Did anyone identify themselves to you——

The Court: She has already answered, Mr. Peterson, that nobody did.

Mr. Peterson: I would like to ask her——

The Court: This is a self-serving declaration, and you are putting words in her mouth. I am going to sustain the objection. Change the subject.

Q. (By Mr. Peterson): Mrs. Walker, would you relate what conversation, if any, or conversations were held at the Albany General Hospital in your presence and in the presence of Emily Renfro after the accident described? A. Yes.

Mr. Gearin: I would like to ask who was present at that time. If it is a state police officer that she can identify, I haven't any objection.

Q. (By Mr. Peterson): Can you identify Mr. William T. Ewing as being the person who talked to you, the state policeman who talked to you at the hospital room at the Albany General Hospital after the accident? A. Yes, I believe he is.

Q. Would you relate the conversation that was held with you at that time and place?

A. Yes, the police officer brought my purse in from the accident. He had found it in the car or somewhere near the car, I couldn't say where, and he asked me then what happened, and I told him

(Testimony of Dorothy S. Walker.)

exactly as far as I knew. He asked me what kind of a truck it was, and I told him. I told him the color and that it was a West Coast truck and if he would hurry he could stop it. He said that, "We must be sure. We must be very sure that it is a West Coast, that you have the correct name of the truck. Do you think that it could have been——" then he explained to me there was lots of other red and silver trucks—"Do you think it could have been Exley or," I believe he mentioned Inland, some of the others. I said, "I know that there are other red and silver trucks, but I saw West Coast so I know it was a West Coast truck." And he said, well, something to the effect that, "Don't worry, we will take care of it."

Q. Did you hear any conversation in your presence between the police officer and any other person immediately afterwards? A. Yes, I did.

Q. What was that conversation? [236]

Mr. Gearin: We will object to that; no foundation has been laid for that, your Honor. It would be hearsay.

The Court: What is the purpose?

Mr. Peterson: He brought this up, a certain portion of the conversation. I want to show all of it.

Mr. Gearin: My conversation only related to the conversation he had with the plaintiff.

The Court: The objection is sustained.

Mr. Peterson: Nothing further.

Mr. Gearin: I have no further questions.

Mr. Peterson: Plaintiff rests.

Mr. Gearin: I would like to take up a legal matter before the Court.

The Court: Ladies and gentlemen of the jury, we will recess now until two o'clock at which time you will hear the arguments of counsel, and thereafter you will hear the instructions of the Court.

Let me urge you once again, please do not make up your minds until you have heard the arguments of counsel and the instructions of the Court, and do not talk about this case to anyone else even among yourselves. You are now excused until two o'clock.

(Jury retires for noon recess.)

Mr. Gearin: At this time, if the Court please, the defendants and each of them jointly and severally move the [237] Court for an order directing the jury to return a verdict in favor of the defendants and each of them and against the plaintiff on the ground and for the reason that there is no satisfactory evidence that the defendants or either of them are guilty of negligence in any particular charged or of any act or omission on the part of the defendants or either of them constituting the proximate cause of the plaintiff's injury and damage.

I particularly point out that the motion is made on behalf of an individual, Mr. Burr, who we submit at this time is not properly identified as being the operator of the truck who forced the plaintiff off the road.

The Court: Do you want Mr. Burr in the case?

Mr. Peterson: I think he is properly in the case, your Honor.

The Court: The motions are denied.

Mr. Peterson: I would like to make an offer of proof.

DOROTHY S. WALKER

recalled, testified as follows:

Direct Examination

By Mr. Peterson:

Q. Mrs. Walker, at the scene of the accident did anyone identify himself as being a state police officer? A. No.

Q. Was anyone at the scene of the accident dressed in a state police officer's uniform, to your knowledge? [238] A. Yes.

Q. Was that person the person who testified here? A. I believe it was Mr. Ewing, yes.

Q. Mr. William T. Ewing? A. Yes.

Q. Mrs. Walker, when did you give birth to the child, your last born child?

A. October 19, 1954.

Q. Was the child earlier than the nine month period of gestation? A. Yes.

Q. What period of gestation was there?

A. About seven and a half months.

Q. Who was the doctor at the time?

A. Dr. George Lage.

Q. Is he an obstetrician? A. Yes.

Q. Was there any inducement for earlier premature childbirth? A. Yes.

Q. Do you know the reason for that?

Mr. Gearin: We object on the grounds of competency.

The Court: The objection is sustained, but let him make his offer.

(Testimony of Dorothy S. Walker.)

Q. (By Mr. Peterson): Do you know the reason for it?

The Witness: Do I answer?

The Court: Yes. [239]

The Witness: Yes, because—shall I say what Dr. Lage told me; is that what you want or——?

The Court: You are not a physician, are you?

The Witness: No, no, sir.

The Court: I told you, Mr. Peterson, that we will listen to the obstetrician's testimony if you bring him up here, but I do not think this witness is competent to testify.

Mr. Peterson: I will withdraw that question, your Honor. That is as far as I can go. I want to ask one other question.

Q. Did you have any difficulty with your back or right hip or coccyx during pregnancy?

A. Definitely, yes.

Q. Do you know the reason or relationship of the pregnancy with your difficulty with your back and coccyx and right hip? A. Yes.

Q. What is the relationship?

Mr. Gearin: We object on the grounds of competency.

The Court: She may answer.

The Witness: Well, as the baby got heavier and the pressure increased on the bone structure in that region it became very painful or sore.

Q. (By Mr. Peterson): Could you wear a back support for it?

(Testimony of Dorothy S. Walker.)

A. I couldn't wear a back support because I could not have tightness over my tummy.

Q. Did any doctor prescribe a back support for you? [240]

A. Dr. Abele told me to wear a tight girdle. That was before I was pregnant. I couldn't wear a girdle because of the pregnancy.

Mr. Peterson: No further questions.

Cross-Examination

By Mr. Gearin:

Q. Are you wearing a girdle now?

A. Yes, sir.

Q. Are you wearing a back support now?

A. No, just a girdle.

Mr. Gearin: That is all.

The Court: I am going to reject your offer of proof. I do not know what was the purpose of asking whether there was an officer at the scene of the accident. The questions to which I objected were questions for conversations with an unidentified person, not an officer who testified here, but they referred apparently to the testimony of the officer who was not on duty.

(Discussion.)

(Noon recess taken.) [241]

Afternoon Session, 2:00 P.M., Trial Resumed.

(Counsel for the respective parties having presented their arguments to the jury, the Court thereupon instructed the jury as follows:) [242]

The Court: Ladies and gentlemen of the jury:

You have now heard all of the evidence and the arguments of the attorneys in the case of Dorothy S. Walker, plaintiff, vs. West Coast Fast Freight and M. L. Burr, defendants. It is now my privilege and duty to lay down for you the rules of law which you are to follow in deciding the questions of fact to be submitted to you. It is your duty as jurors to follow the law as stated in my instructions and to apply the law so given to the facts as you find them in the evidence before you without bias, prejudice, or sympathy for or against either the plaintiff or the defendants. You are not to single out one instruction alone as stating the law, but you must consider the instructions as a whole. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in my instructions.

You have heard the arguments of the attorneys. As they themselves have told you, what an attorney says either during the course of the trial or in his argument to you or to me is not evidence. The attorney is not under oath, and his duty is a partisan one to his client. If an attorney has related what he regards to be evidence and it disagrees with your memory, you are to take your own memory of the

testimony and not that of an attorney. The particular purpose of an argument to a jury is to suggest [243] inferences and deductions which the particular attorney believes can be drawn from the evidence.

While you may follow the inferences and deductions that are made to you by a particular attorney if they seem reasonable and logical to you, you are not bound to do so.

It is the duty of the Court to admonish the attorney who out of zeal for his cause does something which is not in keeping with the rules of evidence or the procedure. You are to draw no inference against a side to whom an admonition of the Court might have been addressed during the trial of this case.

A judge of the Federal Court has the privilege of commenting on the evidence. If I do so in this case I shall tell you what portion of my instructions constitute comment.

The function of a judge is different from that of either the jury or the attorneys in a trial of a case. The judge's function is to lay down the rules of law that govern the trial and to see that the trial is free from error. The judge must necessarily rule upon questions of law throughout the case. These rulings on questions of law have no relation, so far as you are concerned, to questions of fact, and if any evidence was ruled out or stricken out then it is your duty to pay no attention to such evidence, and if evidence was not admitted you are not to speculate upon what might have been proved if the ruling had

been otherwise [244] and the evidence had been admitted.

If any of you know or think that you know by any expressions or words of mine what I think about this case and how it should be decided, you are not bound by my opinion on that subject. You are the sole and exclusive judges of all questions of fact and the credibility of all witnesses. However, I will lay down certain rules of law to govern you in your determination of the facts, and these rules are final and binding upon you whether you agree with them or not.

You are to decide the questions that are to be propounded to you solely on the basis of the evidence that has been introduced at this trial. If you have acquired or think you have acquired any knowledge or information concerning any issue involved in this action from any source other than the evidence, you are not to convey such information to any other juror, and you are not to consider it yourself.

This case is based upon a claim of negligence. Plaintiff claims that the defendants were guilty of negligence in a number of respects which I shall outline for you, and she claims that such negligence forced her car off the highway and into a ditch as a result of which she contends she was seriously and painfully injured. The defendants have denied these allegations; therefore, your first inquiry must be: Was Mr. Burr operating a West Coast Fast Freight truck at the scene of the accident at the time Mrs. Walker was forced [245] off the road? Of course, if Mr. Burr was somewhere else and some other truck

was involved in the incident described by Mrs. Walker, your deliberations will be at an end, and you will bring in a verdict for the defendants. Before you can consider the question of negligence, plaintiff must prove by a preponderance of satisfactory evidence that defendants' truck was the one involved in this accident.

The burden of proving an allegation is laid upon the party making any claim. That claim must be proved by a preponderance of satisfactory evidence. In determining whether plaintiff has sustained this burden, evidence is deemed satisfactory only if it produces moral certainty or conviction in an unprejudiced mind. Only evidence which produces such moral certainty or conviction is sufficient to justify a verdict. Any evidence less than this is insufficient. If the evidence on any issue is evenly balanced, you may not find in favor of the person who has the burden. A preponderance of satisfactory evidence does not mean the greater number of witnesses, but it means the greater weight and the convincing character of the evidence that is introduced.

If you find by a preponderance of satisfactory evidence that Mr. Burr was driving a West Coast Fast Freight truck at the time and place of the accident, you will consider whether the defendants were guilty of one or more acts of negligence charged against them by plaintiff. [246] However, before I take up the specific acts of negligence I will lay down some general rules which will govern you in your deliberations.

The mere fact that an accident occurred is no evidence of negligence, and you may not find that defendants were guilty of negligence solely by reason of the fact that an accident occurred. The law does not impose liability upon any person in the absence of fault, nor does the law presume that any person is at fault in the absence of proof of such fault. On the contrary, the law presumes that each party involved in this case exercised all the care which an ordinarily prudent person would have exercised under all of the circumstances.

The defendant West Coast Fast Freight is a corporation, and corporations must necessarily act through individual persons. Mr. Burr, the driver of the truck, was an employee of West Coast, and during this trip to California on Highway 99E he was acting in the course of his duties of employment. Therefore, if you find that this truck was involved in the accident with Mrs. Walker and if you find that such driver did or failed to do something which under the circumstances amounted to negligence, then such negligence, if any is deemed to be the negligence of his employer, West Coast Fast Freight.

Negligence is defined as the doing of an act which a person of ordinary prudence would not have done under the [247] same or similar circumstances, or the failure to do an act which a person of ordinary prudence would have done under the same or similar circumstances. This is the common law definition. In addition, there are certain statutory rules for the operation of motor vehicles on the highway, and these statutory rules make it incumbent upon a per-

son of ordinary prudence to act in accordance with their directions, and the failure to so act constitutes negligence in and of itself.

Here are the specifications of negligence upon which plaintiff must recover, if at all.

First, plaintiff claims that the defendants were negligent in driving and operating the motor truck when the same was not equipped with clearance lamps and reflectors as required by law for not having the clearance lamps lighted. Under the law, after sunset a truck and trailer such as the one owned by defendant West Coast Fast Freight, which is more than 30 feet in length is required to have two clearance lamps, one on each side of the front and rear, and two side marker lamps on each side, one near the front and one near the rear, and a reflector on each side near the front. The front clearance lamps and marker lamps and reflectors shall reflect an amber color and shall be between 2 feet and 5 feet from the ground. These reflector and clearance lamps and side marker lamps shall be visible under normal atmospheric conditions for a distance of 500 feet.

You have heard the testimony, and it will be [248] for you to determine whether the defendant had lights on the truck in accordance with the requirements of this statute and whether they were all burning at the time of the alleged accident. If you find that they were not maintained or not burning, then such condition would violate the statute and would constitute negligence in and of itself.

Plaintiff next contends that the defendant was

negligent in passing another vehicle proceeding in the same direction as the motor truck when the left side of the highway was not clearly visible and free of oncoming traffic for a sufficient distance ahead to permit the truck to overtake and pass the other vehicle in safety.

The state law provides that: The driver of a vehicle shall not drive to the left side of the center line of a highway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without impeding the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken.

You have heard the evidence on this point, and it will be for you to determine from all of the evidence whether the plaintiff has proved by a preponderance of satisfactory evidence that the defendants were guilty of negligence in such respect. [249]

Lastly, plaintiff contends that the defendants failed to maintain a proper or any lookout for other vehicles and particularly for the vehicle which was operated by plaintiff. In this connection I instruct you that every operator of a vehicle on a highway is required to keep a proper lookout for other vehicles using such highway, and a proper lookout means that kind of a lookout that a person of ordinary prudence would have maintained and exercised under the same or similar circumstances.

If plaintiff fails to prove by a preponderance

of satisfactory evidence that the defendants were guilty of negligence in one or more of the four specifications to which I have referred, then your deliberations will be at an end, but if you find by a preponderance of satisfactory evidence that the defendants were guilty of at least one of such acts of negligence, then you will consider the question of proximate cause.

Proximate cause is probable cause. It is that cause which in direct sequence, without any efficient intervening cause produced the accident and injury. Therefore, if you find that the defendants were guilty of negligence in one or more particulars charged against them by the plaintiff, that does not settle your problem unless you go further and find by a preponderance of satisfactory evidence that the particular negligence was the proximate cause of the injury. [250]

If you find in favor of the defendants, of course, your deliberations will be at an end, and you will return a verdict in favor of the defendants. However, if you find from a preponderance of satisfactory evidence that the defendants were guilty of one or more acts of negligence which proximately caused the accident, then you will consider the question of damages which plaintiff alleges she sustained. The fact that I instruct you on damages does not mean I am of the opinion that plaintiff is or is not entitled to recover against the defendants. I am expressing no opinion on that subject one way or the other. Damages, like any other proposition, must be proved by a prepon-

derance of the evidence on the part of the person making the claim, and plaintiff being a claimant must sustain that burden. In other words she must prove her claim of damages by a preponderance of satisfactory evidence. If you find that plaintiff is entitled to recover damages, you will then award her such sum of money as damages as will fully, justly and completely compensate her for the injuries which you find she has suffered by reason of the negligence of the defendants in the accident. In so doing, you should take into consideration the injuries which she has sustained, the disability, pain and suffering which she has endured, and the disability, pain and suffering which she will endure in the future, if you find that plaintiff will endure such disability, pain and suffering as a result of that accident. [251]

I had not intended to discuss the particular types of injuries which Mrs. Walker contends she suffered, but in view of the fact that the arguments of counsel are in such disagreement I think I shall. She claims on February 10, 1955, which is ten days ago, that she was suffering from numerous bruises and contusions to the plaintiff's body, severe brain concussion and brain damage, severe physical and mental shock and physical and mental pain and suffering, a severe tearing, twisting and wrenching of the tendons, muscles, ligaments, bones, nerves and soft tissue of her neck back, pelvic area, right hip and leg, injuries to her upper chest, and aggravation of pre-existing arrested tuberculosis,

from all of which plaintiff was rendered sick, sore, nervous and distressed, and that plaintiff has permanent injuries to her head, neck, back, right hip and leg, and the internal organs of her chest, and will be permanently afflicted with the results of aggravation and dissemination of said tuberculosis.

As you heard from decisions from counsel, some of these claims have now been withdrawn, and as to permanent injury—as to the tuberculosis, of course, you cannot award her anything for that because she had tuberculosis prior to the time of the accident. Even if you award her on the accident, you cannot allow her a sum by way of compensation by reason of the tuberculosis by way of permanent damage, and the same is true of any claim for brain damage. No amount may be allowed for permanent [252] injury to the brain or permanent injury to the hip.

Mrs. Walker contends that she has been, and there is evidence that she suffered injury to her coccyx and injury to her low back which at least one physician says is permanent, at least, there is a dispute on that point so you can consider whether or not she has suffered permanent injury to her back and to her coccyx.

In connection with those claims for permanent injury, I instruct you that before you are warranted in allowing any sum by way of compensation for any alleged permanent injury, you must be reasonably certain, from a preponderance of satisfactory evidence, that the plaintiff has sustained permanent injury and disability.

You have heard the evidence with reference to the other injuries which plaintiff says she sustained, and you have heard the medical testimony, and you are to allow her such sum as you regard as reasonable for those other injuries, whatever you find them to be, but you may not allow any sum by way of permanent injury except if you find that she has permanent injury to her coccyx and low back.

In addition to plaintiff's claim for pain and suffering and the injuries which she has sustained, plaintiff has asked for an allowance of \$956.13 for medical and hospital expenses which she has incurred. If you find in favor of the plaintiff, she would be entitled to a reasonable amount [253] incurred by her for the reasonable value of the medical and hospital services which she received and for which she is liable. Therefore, if you find for the plaintiff, you may allow her the sum of \$956.13 for medical and hospital expenses, and that is in addition to the amount you allow her for general damages.

The amount you will award plaintiff must be reached and founded upon an unprejudiced consideration of all the facts of the case and without sympathy, prejudice or a desire to punish anyone and without any thought of plaintiff's financial condition or the defendant's ability to pay.

I want to make one comment. The principle question involved in this lawsuit is whether plaintiff has proved by a preponderance of the evidence that defendant's truck was the one involved in this

accident. In my opinion, it does not make any difference whether the lights were burning or not burning. If a truck came over on the wrong side of the road and drove this lady off the highway, she is entitled to recover. If it was a West Coast Fast Freight truck—it does not matter whether the lights were burning or whether the crest of the highway was 500 or 600 feet away—if that was the truck that did it and it was on the wrong side of the road, in my view, she is entitled to recover, but you must find that it was a West Coast Fast Freight truck that drove her off the highway. [254]

You are the sole and and exclusive judges of the facts in the case and of the credibility of all witnesses. Your power of judging the effect or value of evidence, however, is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence.

Even though it is your function and yours alone to decide where the truth lies, by what yardstick and in accordance with what rules of law are you to judge the credibility of witnesses? Every witness is presumed to speak the truth, but this presumption may be out-weighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence.

You should carefully scrutinize the testimony given, the circumstances under which each witness testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Of course, when I speak of witnesses I speak of

the plaintiff and the defendants who, whether they testified in person or in deposition, are witnesses in the case. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. [255] Two or more persons witnessing an incident or a transaction may see or hear it differently, and innocent misrecollection, like the failure of recollection, particularly as to times, dates, and places, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy results from innocent error or wilfull falsehood. If you find the presumption of truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you think it deserves.

In other words, there is nothing peculiarly different in the way a jury is to determine the credibility of a witness from that in which all reasonable persons size up other people with whom they are dealing when making important decisions. You consider whether the person with whom you are dealing had the opportunity to observe and be familiar

with and remember the things he tells you about. You consider any possible interest he may have, and any bias or prejudice. You consider the person's demeanor. You decide whether he strikes you as fair and candid. In other words, you "size him up." Then you must consider the inherent believability of what he says and whether it accords with your own judgment or experience.

The same is true of witnesses. You ask yourself if they know what they are talking about. You watch them [256] on the stand as they testify and note their demeanor. You decide how their testimony strikes you.

Take a matter of interest, for example. You may consider that some witnesses, whether for the plaintiff or the defendants, have an interest in the outcome of the case. Where a witness has a personal interest in the result of the trial, the temptation may be strong to color, pervert, or withhold the facts, or even though completely honest, a witness who has an interest in the case may unconsciously shade his testimony. On the other hand, such a witness may be telling the exact truth despite his interest in the outcome. You must consider all the attendant circumstances in deciding whether and to what extent interest may affect the witness.

The greater a person's interest in the case, the stronger is the temptation to false testimony, and the interest of the plaintiff is of a character possessed by no other witness.

Manifestly, she has a vital interest in the outcome

of the case. This interest is one of the matters you may consider along with other attendant circumstances in determining the credence you will give to her testimony.

Before reaching any conclusion as to whether you believe the testimony of any particular witness or of the plaintiff herself or the defendants or as to whether you will believe part of the testimony of such witness or party [257] and reject the rest, it is essential that you give consideration to all the circumstances bearing upon the question of credibility as I have outlined it for you.

While you are not at liberty to reject the testimony of a witness arbitrarily, there are occasions when you are justified in so doing. Under the law, if you find that a witness has testified falsely in any one material part of his testimony, you may look with distrust upon the other evidence given by such witness, and if you find that any witness has testified wilfully false, you will be at liberty to disregard all the evidence given you by such witness unless corroborated by other evidence which you do believe.

The direct testimony of any witness to whom you give full credit and belief is sufficient to establish any issue in this case. Therefore, you are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind, as against the declarations of a lesser number, or a presumption, or other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at

liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice. It does mean that you are not to decide any issue by the simple process of counting the number of witnesses who have testified on the opposing side. It means that the final test is not in the relative number of witnesses, but in the relative [258] convincing force of the evidence.

Any fact in the case may be proved by direct or indirect evidence. Direct evidence is that which tends to prove a fact in dispute directly without any inference or presumption and which in itself, if true, conclusively establishes the fact. If a witness testifies to a transaction to which he has been an eye-witness, that is direct evidence. Indirect or circumstantial evidence is that which tends to establish a fact in dispute by proving another and which, though true, does not in itself conclusively establish the fact, but affords an inference or presumption of its existence. Indirect evidence sometimes may be stronger on account of the inferences which may be drawn from it than the testimony by witnesses.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. An exception to this rule is the case of an expert witness. A witness who by education and experience has become an expert in any art, science, or profession may state his opinion as to a matter in which he is versed and which is material to the case, and he may also state his reasons for such opinion. In this case you have heard the testimony of the

physicians who qualified as experts. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves. Such opinion will be judged upon the same basis as you would [259] judge the opinions of lay persons who have testified except that you are entitled to give it more weight if you decide that, because of the experience and training of the expert, his opinion is more likely to be accurate than that of an untrained person. You may reject it entirely if you think that the reasons given in support of the opinion are unsound.

You should look with caution upon the oral admissions of a party, as that kind of evidence is subject to mistake. The party may have been misinformed or may not have clearly expressed his or her meaning or the witness may have misunderstood him. However, if you find that the admission was knowingly made, then, of course, it may be used for all purposes.

You will have with you in the jury room all of the exhibits that have been admitted in evidence, and you will have with you two forms of verdict. The verdict for plaintiff reads as follows: "We, the Jury, duly empaneled and sworn to try the above-entitled cause, do find our verdict in favor of the plaintiff Dorothy S. Walker, and against the defendants West Coast Fast Freight, Inc., a corporation, and M. L. Burr, and each of them, and assess plaintiff's damages in the sum of \$." If you find for plaintiff, you are to use this form of verdict, and you are to include in that one blank space all the

amounts to which you find plaintiff is entitled, that is, the \$956.13 for hospital and medical care, and the amount you [260] find for the permanent damage and the other injuries which she sustained, and you are to include in this one blank space allowance for pain and suffering and all the other items to which I referred in my instructions on damages.

The verdict is to be signed by the foreman alone. I call your attention to the fact that in the Federal Court the verdict must be unanimous; therefore, before the foreman signs this verdict, he or she, whoever it may be, must make sure that it represents the unanimous opinion of each juror on each issue. In other words, it must not only be on the question of liability but also on the question of damages.

I think in the past I have told you about quotient verdicts. If you come to the question of damages you cannot agree in advance that each person will set down the amount to which he or she believes plaintiff is entitled, add it up, and then divide it by twelve and say in advance that that is the amount which you are going to give to the plaintiff. Under the law, that type of verdict, which is called a quotient verdict, or any other verdict obtained in any mechanical way is unlawful. Each person must agree to the amount of the verdict. The jurors cannot agree in advance as to the technique of doing it.

If you decide in favor of defendants, you will use the other form of verdict which says: "We, the jury, empaneled and sworn to try the above-entitled cause, do [261] find our verdict against the plain-

tiff and in favor of the defendants.” Before you can use that verdict, which is to be signed by the foreman alone, it likewise must represent the unanimous opinion of each of the jurors. That means each juror has to agree.

Before the bailiff is sworn there is a legal matter that I would like to take up with Counsel in Chambers.

(Thereupon the following proceedings were had in the Court’s chambers:)

Mr. Peterson: I do not know what the Court’s practice is in respect to giving what is defined under the Oregon statutes as being statutory instructions, the one in relation to evidence to be judged not alone by its intrinsic weight but the evidence that is within the power of a party to produce. Therefore, if the weaker or less satisfactory evidence is produced when it appears that a stronger and more satisfactory can be produced, such evidence is to be viewed with distrust. I do not know what the practice of the Court is.

The Court: We do not give that. Unless it is requested we would not give it, and in this particular case I do not think I would give it because each party under our practice had the opportunity of getting the same evidence. You may have an exception.

Mr. Peterson: With that, the plaintiff has no other exceptions. [262]

Mr. Gearin: The defendants and each of them, your Honor respectfully objects to the Court’s sub-

mission to the jury—although there was later comment with regard to the lack of clearance lights and reflectors—in giving the statute on lamps and reflectors to the jury, on the ground and for the reason that there is no evidence whatsoever that we did not have reflectors, and, secondly, that as a matter of law the matter of clearance lights and reflectors could not have any casual relation with the accident.

We object to the failure of the Court to withdraw the charge of lookout and submitting the same, that being our requested instruction No. 8, on the ground and for the reason that there is no evidence in this case that the defendants or either of them were guilty of negligence in that particular.

In Open Court

The Court: You are now excused to go and deliberate.

(Jury retires for deliberations at 3:50 p.m.
After deliberating the jury returned to open court and the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, Mr. Price, the bailiff, informs me that you have a question.

Foreman Marian I. Green: I have, your Honor. In fact, the jury has two questions they are not clear about [263] and would like an answer for it.

The Court: Does it involve matters about which I have already instructed you?

Foreman Green: Well, they are concerning matters of evidence.

The Court: You mean they are evidence that you do not recall?

Foreman Green: We do, but they want to know why the evidence was not produced.

The Court: In this court you cannot speculate about evidence not being produced. You have to take the evidence as it is introduced here. The attorneys are the ones that determine what evidence shall be submitted in court.

Foreman Green: We understand that, but they are still rather adamant about one particular point that I am not able to convince them on, and they want to know why, I have given my opinion of what I think that there is in evidence. Could I approach your desk and ask? Or is that not allowed?

The Court: I thought that I had given you all the instructions that are necessary. We do not like to give any new instructions.

Foreman Green: I really do not know what to do about it. I have done what I thought was right, but they seem to think that it should be cleared up before they can [264] reach a decision.

The Court: I am going to let you state the question. According to the understanding that counsel and I reached before, no question will be answered at the time you asked it unless everybody consents to it, and even if you ask the question I might not consent to it.

Foreman Green: Well, that is agreed upon, and the question was why the driver's log was not produced.

The Court: Do you mean the tachograph?

Foreman Green: The log. If I understood right, the tachograph was destroyed, to my knowledge, but the question was about the driver's log.

The Court: I would like to see counsel in chambers.

(Thereupon, the following proceedings were had in the Court's chambers:)

The Court: I will tell the jury that under the rules of law either party can get any information that is in existence through the deposition procedure and through notice; that it was not produced by either party, and from that they may draw an inference that it would not show anything or that it was not available.

Mr. Gearin: That would be very fair, your Honor.

The Court: Or I could just say that it was not available.

Mr. Gearin: I think your initial statement would be very fair to everybody concerned because they only took the [265] deposition of our driver and no one else, your Honor.

Mr. Peterson: I would feel in view of the evidence in the case that probably the question should be unanswered. I recognize it is a very difficult question.

The Court: Do you want the question not to be answered?

Mr. Peterson: I would think that that would be correct in view of the case.

Mr. Gearin: It is up to them to prove what was

in the log, and they cannot make us produce records all over the map when they had it within their power to produce it. We do not have to prove anything. I think what your Honor said just a minute ago as to the explanation under the rules of law that we have, I think that was fair to everybody, and to leave it unanswered now certainly would be more than prejudicial to the defendants.

The Court: It may be, but you are the one who asked for it. I gave you that opportunity.

Mr. Peterson: That was a pure oversight of counsel, your Honor. I attempted to answer it and argue it. It came out in argument, your Honor. Your Honor was perfectly right in ruling as you did. I would have no complaint about your Honor's ruling. I believe, however, to be fair with us, that what your Honor indicated you would have to say, that they could have produced it or explained its absence, but there is nothing to be drawn by its failure to be here. Nobody has produced it, especially since we have [266] no burden of proof.

The Court: I will say that no inference is to be drawn one way or the other by its absence.

Mr. Gearin: That is all right with me.

The Court: Is that all right?

Mr. Peterson: I think that that would be outside the evidence, your Honor. I sincerely feel that that would be outside of the evidence that the jury is bound to consider.

(Thereupon in open Court the following proceedings were had:)

The Court: Ladies and gentlemen of the jury, I

have taken the matter up with both of the attorneys, and I have considered some law, and I have come to the conclusion, and both counsel agree with me, that this question cannot be answered now. We are all of the opinion that no inference either for or against the plaintiff or the defendant can be drawn by the jury from the failure to produce that document, nothing bad, nothing good against either the plaintiff or the defendants by that failure, and you must decide the case on the evidence that has been introduced.

Foreman Green: Thank you, your Honor.

(Thereupon, the jury retired for further deliberations.)

Mr. Gearin: I have no exception to the Court's remarks.

Mr. Peterson: Your Honor, I agree with the first, no exception to the Court instruction the jury that the [267] question could not be answered, but I would save an exception to the Court directing the jury that they could draw no inference under the evidence in this case.

The Court: I thought that is what we agreed to in chambers before we came into open court, and you had specifically told me that this was outside the evidence; they could not consider it, and I told you before that I would instruct them that no inference for or against either party can be drawn by the failure to produce that evidence. I was under the impression that you agreed to it.

Mr. Peterson: Your Honor, perhaps I did not

make myself clear. I thought I advised the Court that it was my view, under the evidence, that the Court should not direct any inference or lack of inference to be drawn but simply the question could not be answered. Perhaps I did not make my point clear in chambers. That is what I attempted to do.

The Court: Do you not recall telling me just as we were leaving the Chambers that it was outside the evidence and could not be considered?

Mr. Peterson: I did, your Honor.

The Court: I will let the record speak for itself.

(Trial concluded.) [268]

Certificate

State of Oregon,
County of Multnomah—ss.

I, Gordon R. Griffiths, an official court reporter to the United States District Courts for the District of Oregon, hereby certify, that at the time and place mentioned in the caption I reported in shorthand all proceedings had and testimony adduced in the above entitled cause; that my shorthand notes were thereafter reduced to typewriting under my direction, and that the foregoing transcript consisting of 268 typewritten pages is a true and correct transcript of all said proceedings had and testimony adduced, and of the whole thereof.

Witness my hand at Portland, Oregon, this 10th day of May, 1955.

/s/ GORDON R. GRIFFITHS.

[Endorsed]: Filed June 10, 1955.

United States District Court,
District of Oregon

Civil No. 7092

DOROTHY S. WALKER,

Plaintiff,

vs.

WEST COAST FAST FREIGHT, INC., a Corporation, and M. L. BURR,

Defendants.

Monday, March 21, 1955, 11:00 A.M.

TRANSCRIPT OF PROCEEDINGS IN RE:
MOTION OF PLAINTIFF FOR NEW
TRIAL

Mr. Peterson: May it please the Court: In this matter counsel for defendants has fifteen minutes ago served me with an affidavit in respect to this motion for a new trial. The essence of the affidavit is that Mr. Gearin was one of the attorneys for defendants; that he has been in charge of the case as far as defendants are concerned since its inception, and at no time did he have any knowledge that plaintiff sustained or was going to claim any of these child-bearing inconveniences or difficulties in child-bearing.

The Court: I have read the affidavit.

Mr. Peterson: I want to advise the Court that long prior to July 9, 1954, eight months prior to the time of this trial, that Mr. Gearin made an appoint-

ment with Dr. John L. Marxer to have Mrs. Walker given a physical examination. An appointment was arranged for July 19, 1954, at 2:30 o'clock. I notified Dorothy Walker upon receipt of this notice, and she advised me that she could not have any physical examination because of pregnancy. When she saw her doctor he advised her that she should not have any pelvic examination because she was five months pregnant and that she should have no X-rays for two or three months after the child was born, and that I immediately communicated——

The Court: What difference would that make?

Mr. Peterson: I want to advise the Court.

Mr. Gearin: I knew she was pregnant, your Honor. [2*]

The Court: He says she was pregnant.

Mr. Peterson: There is no surprise as far as the defendant is concerned.

The Court: There is no surprise about the pregnancy, but you have not set it out in your pre-trial order.

Mr. Peterson: That is true, your Honor, I have not set it out, but this is the language that I have used, and I respectfully say to the Court that what we sought to prove was admissible under those pleadings.

The Court: Mr. Peterson, I gave you an opportunity to call your doctor, and you did not do it.

Mr. Peterson: You advised me that the Court would not receive it. As a matter of fact, when I

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

made my opening statement to the jury you said that that was not proper and we could not prove it.

The Court: Then you tried to get it in on the testimony, and I said you could not do it in that way, in any event, and you said that you wanted to make an offer of proof. In the first place, I told you to call the doctor back, but then you told me that for the first time you learned that he was not the doctor who could testify to that.

Mr. Peterson: That is right.

The Court: Then you said that the only doctor that could testify would be the obstetrician and you would try to get hold of him.

Mr. Peterson: Correct.

The Court: Mr. Peterson, you came here trying to make an opening statement on a subject matter about which you had never talked to a physician, did you not?

Mr. Peterson: No, your Honor.

The Court: When had you talked to the obstetrician?

Mr. Peterson: I received a letter from the obstetrician dated August 9, 1954, and I will read that letter to the Court.

The Court: Had you made arrangements for the obstetrician to come into court?

Mr. Peterson: No, I had not, your Honor.

The Court: I do not think very much of that contention, and the contention is denied. You may have an exception.

Mr. Peterson: Your Honor, the Court instructed the jury that they could not consider her life ex-

pectancy, and the Court would give no instruction as to her life expectancy or any matter relating to her life expectancy. I believe the Court stated to me and to Counsel that because she had had tuberculosis her life expectancy could not be considered by the jury.

The Court: Mr. Peterson, she not only had tuberculosis but she was taking treatment at the time of the accident, and I think she was taking treatment at the time of the trial. Here is a woman who is suffering from tuberculosis, and I do not think that under those circumstances the mortality tables are admissible.

Mr. Peterson: The case of *Frangos vs. Edmunds* held that they are; 179 Oregon.

The Court: For a person suffering from tuberculosis?

Mr. Peterson: No, but the rule was that the Court takes judicial notice of that and that when a person has permanent injuries the Court may instruct the jury as to what the mortality tables are, but the determination of life expectancy of the plaintiff when he or she has permanent injuries is a question of fact for the jury to take into consideration; the age, sex, health, the nature of the plaintiff's occupation, whether hazardous or not.

The Court: Suppose that she had had instead of tuberculosis cancer of the stomach. Would you say that I should instruct the jury on the question of the mortality tables?

Mr. Peterson: Yes, because that is a question of fact for the jury's determination.

The Court: I am going to deny your motion for a new trial on that ground also.

Mr. Peterson: My third main point, your Honor, is inadequacy of the verdict. The testimony was that she had occurred 956 dollars, some-odd, special damages, but the jury gave her \$1,500. I submit that under the decided cases such a verdict is inadequate, and in the Federal Court, as I understand it, grounds for granting a new trial are—— [5]

The Court: Mr. Peterson, this is a consistent verdict if the jurors did not believe some of your own physicians because I believe it was perfectly proper for the jury to come to the conclusion that this woman was suffering from tuberculosis but that her condition had not been aggravated a great deal or at all by the accident. The testimony was that she coughed up a little blood within a very short time, and there was quite a disagreement at that time between her testimony and the medical and the hospital reports as to the quantity of blood. Likewise, I thought your medical testimony was very weak, particularly testimony of Dr. Selling. That was better testimony for the defendant. I do not see how on the basis of the testimony of your physicians the jury could have allowed her a great deal. Her testimony was much better as to the amount of disability. I did not think that it was supported by the medical testimony.

Mr. Peterson: Your Honor, if I may, here is what the doctors testified, as I recall it. Dr. Tuhy testified that she had scar tissue on her lungs; that she had a bruised lung as a consequence of this ac-

cident, and because of the scar tissue she had bled into the lung, bled into the lung, and that was one of the primary reasons that he hospitalized her for seven weeks at the University Hospital to check to see if there had been exacerbation or aggravation of the tuberculosis, [6] but he thought there was no dissemination of tuberculosis and that she had no permanent injury of the lung.

Dr. Selling, a neurosurgeon, testified she had a brain injury.

The Court: Mr. Peterson, you did not listen to his testimony. He did not say that she had a brain injury.

Mr. Peterson: I should submit, your Honor, he said as evidence by the tests which he did, neurological tests, which had disappeared at the time of the trial, which were residual, the headaches which he thought would disappear within two or three years. That was the essence of Dr. Selling's testimony.

Dr. Abele testified she had a lumbosacral sprain. It was permanent. It would require reasonably, probably, that she would have to have a spinal fusion; that she had a coccyx injury which would require surgical removal.

The only adverse testimony medically was that of Dr. Jones, and Dr. Jones said that upon the business occupation from the plaintiff's standpoint, his testimony is that she had a painful coccyx and a painful hip upon his examination. Otherwise, he said he found no objective symptoms of injury.

Now, that is from the worst and the best stand-

point of the medical testimony. I submit that it is inadequate.

The Court: I realize that the plaintiff did not get the verdict that she anticipated getting, and it may very well be that some of the liability elements played a part, but under [7] the decisions I do not believe that the plaintiff is entitled to have a judicial declaration that there is inadequacy in damages because, had the jury believed the testimony of Dr. Jones, they could have found that the plaintiff suffered damage to \$1,500 or perhaps even less. I do not think that this is a case in which I should disturb the verdict of the jury, and the motion is denied.

(Hearing concluded.)

Reporter's Certificate

I, Gordon R. Griffiths, an Official Reporter for the United States District Court for the District of Oregon, hereby certify that I reported in shorthand at the time and place mentioned in the caption sheet, all proceedings had in the above-entitled matter; that I thereafter caused my shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of 8 pages, is a true and correct transcript of said proceedings, and of the whole thereof.

/s/ GORDON R. GRIFFITH,
Reporter.

[Endorsed]: Filed August 8, 1955.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Pre-trial order; Verdict; Judgment order; Motion for a new trial; Judgment and order denying motion for new trial; Notice of appeal; Bond for costs on appeal; Designation of record; Order to forward exhibits to Court of Appeals; Appellees' designation of record; Affidavit of John Gordon Gearin; Consent to addition of attorney; Order declaring Burton J. Fallgren as attorney of record; Transcript of docket entries; Motion to extend time to docket appeal; Affidavit of Burton J. Fallgren; Order extending time to June 16, 1955, to docket appeal; and Statement of points upon which plaintiff intends to rely, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7092, in which Dorothy S. Walker is the plaintiff and appellant and West Coast Fast Freight., Inc, a corporation, et al. are the defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and appellees, and in accordance with the rules of this court.

I further certify that the cost of filing the notice

of appeal is \$5.00, and that the same has been paid by the appellant.

I further certify that there is also enclosed the reporter's transcript of proceedings of February 23, 1955. Under separate cover we are forwarding Exhibits 1-A to J; 4; 6; 8; 10; 11; 12; 14-A to E; 26-A to E; 27; 30-A to D; and 31-A and B. Also reporter's transcript of proceedings during hearing of appellant's motion for new trial, (No. 2 of Appellees' designation of record).

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 10th day of June, 1955.

[Seal] F. L. BUCK,
 Acting Clerk,

By /s/ THORA LUND,
 Deputy.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing document consisting of transcript of testimony of proceedings had on March 21, 1955, constitutes the supplemental record in cause numbered Civil 7092, Dorothy S. Walker, Plaintiff and

Appellant, and West Coast Fast Freight, Inc., a corporation, et al. are the defendants and appellees.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court on Portland, in said District, this 9th day of August, 1955.

[Seal] R. DEMOTT,
Clerk.

By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 14788. United States Court of Appeals for the Ninth Circuit. Dorothy S. Walker, Appellant, vs. West Coast Fast Freight, Inc., a Corporation, and M. L. Burr, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed June 11, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14788

DOROTHY S. WALKER,

Appellant,

vs.

WEST COAST FAST FREIGHT, INC., a Corporation,
and M. L. BURR,

Appellees.

STATEMENT OF POINTS UPON WHICH
PLAINTIFF INTENDS TO RELY

Pursuant to Rule 19(6) of the rules of the above-entitled Court, appellant presents the following statement of points upon which she intends to rely on appeal of the above-entitled cause.

1. The trial Court erred in advising counsel for the plaintiff during opening statement that said counsel's reference to pain and difficulties from pregnancy and childbirth of the plaintiff subsequent to the injuries complained of should not have been referred to and were not admissible upon trial, without objection made by counsel for defendants. (Tr. P. 1-O) (Designation No. 1 Pre-Trial Order).

2. The trial Court erred in refusing to permit plaintiff to prove by expert medical testimony the effects of the injuries to her lower back, known to medical science as lumbo-sacral sprain, and displace-

ment of her coccyx. (Tr. P. 1-O et seq and PP. 239 et seq. Designation No. 1 Pre-Trial Order).

3. The trial Court erred in refusing to permit plaintiff to testify as to the effects in the nature of pain and suffering and the difficulties of pregnancy and childbirth, arising from the injuries complained of. (Tr. P. 32) (Designation No. 1 Pre-Trial Order).

4. The trial Court erred in failing to sustain plaintiff's objection to the question asked on direct examination of defendant's expert medical witness, Dr. Orville Noble Jones, as follows: (Tr. P. 114)

“Question: Will you relate to the jury what this lady told you with reference to how she got hurt.” and in permitting said medical expert witness to relate in answer to said question a purported history of injury.

5. The trial Court erred in failing and refusing to give plaintiff's requested instruction No. 8, which written instruction is as follows:

“In this case, if you find that the plaintiff Dorothy S. Walker is entitled to a verdict at your hands, then it will be your duty to assess plaintiff's damages. You are instructed that the law aims at just, fair and reasonable compensation. In assessing damages for the plaintiff, you will take into consideration the nature and extent of plaintiff's injuries. You will also take into consideration all of the pain and suffering which plaintiff has endured, if any, as a result of injuries sustained by her. Such pain and suffering includes both

physical and mental suffering. You will also take into consideration whether plaintiff will be caused to endure pain and suffering in the future. You will also take into consideration whether plaintiff's injuries, if any, are permanent. If you find that plaintiff's injuries are permanent, then you will take into consideration plaintiff's life expectancy.

"You are instructed that under the Standard American Mortality Tables, a person of the age of thirty-five years has a life expectancy of 33.44 years. However, plaintiff's life expectancy is a question of fact for you to determine, taking into consideration plaintiff's age, sex, health, habits and nature of her occupation, whether hazardous or not.

"You will also take into consideration whether plaintiff's injuries, if any, permanently impaired her ability to work and perform physical activities.

"You will also take into consideration the amount of the reasonable value, as shown by the evidence in this case, of all doctor, hospital, ambulance and medical expenses incurred by the plaintiff in the treatment of injuries sustained by her, if any.

"After considering all of the foregoing matters, you will assess such sum of money to the plaintiff as will fairly and reasonably compensate her for her injuries, if any, her pain and suffering, both physical and mental, past and future, if any, and the permanent effect of her injuries upon the plaintiff, if you find that plaintiff has permanent injuries."

6. The trial Court erred in its instructions to the jury in making the following statement: (Tr. P. 253).

“Mrs. Walker contends that she has been, and there is evidence that she suffered injury to her coccyx and injury to her low back which at least one physician says is permanent, at least, there is a dispute on that point so you can consider whether or not she has suffered permanent injury to her back and to her coccyx.”

7. The trial Court erred in its instructions to the jury in making the following statement: (Tr. P. 253.)

“In connection with those claims for permanent injury, I instruct you that before you are warranted in allowing any sum by way of compensation for any alleged permanent injury, you must be reasonably certain, from a preponderance of satisfactory evidence, that the plaintiff has sustained permanent injury and disability.”

8. The trial Court erred in its instructions to the jury in making the following statement: (Tr. P. 257.)

“The greater a person’s interest in the case, the stronger is the temptation to false testimony, and the interest of the plaintiff is of a character possessed by no other witness.

“Manifestly, she has a vital interest in the outcome of the case. This interest is one of the matters

you may consider along with other attendant circumstances in determining the credence you will give to her testimony.”

9. Error prejudicial to plaintiff appellant occurred by misconduct of the jury in failing and neglecting to award plaintiff an adequate sum for plaintiff's injuries and damages as shown by the evidence in the case. (Designation No. 2, Verdict.)

10. The trial Court erred in failing and refusing to grant plaintiff's motion for a new trial. (Designation No. 4, Order Denying Motion for New Trial.)

Appellant adopts the designation of record as filed in the United States District Court for the District of Oregon, in the above-entitled cause.

PETERSON & POZZI,

BERKELEY LENT,

BURTON J. FALLGREN,

By /s/ NELS PETERSON,

Attorneys for Appellant.

Duly verified.

[Endorsed]: Filed June 16, 1955.

